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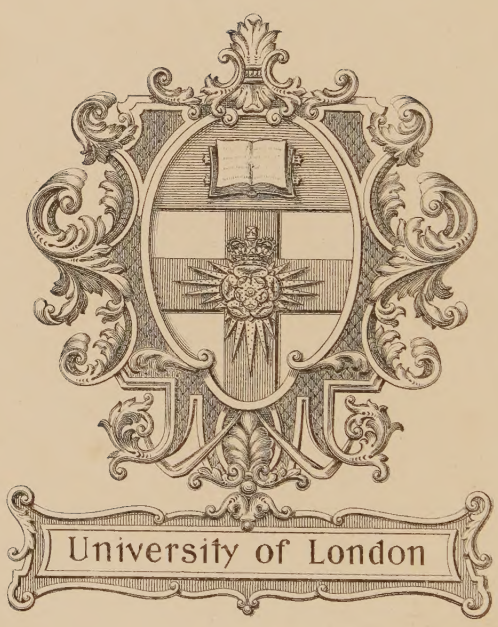

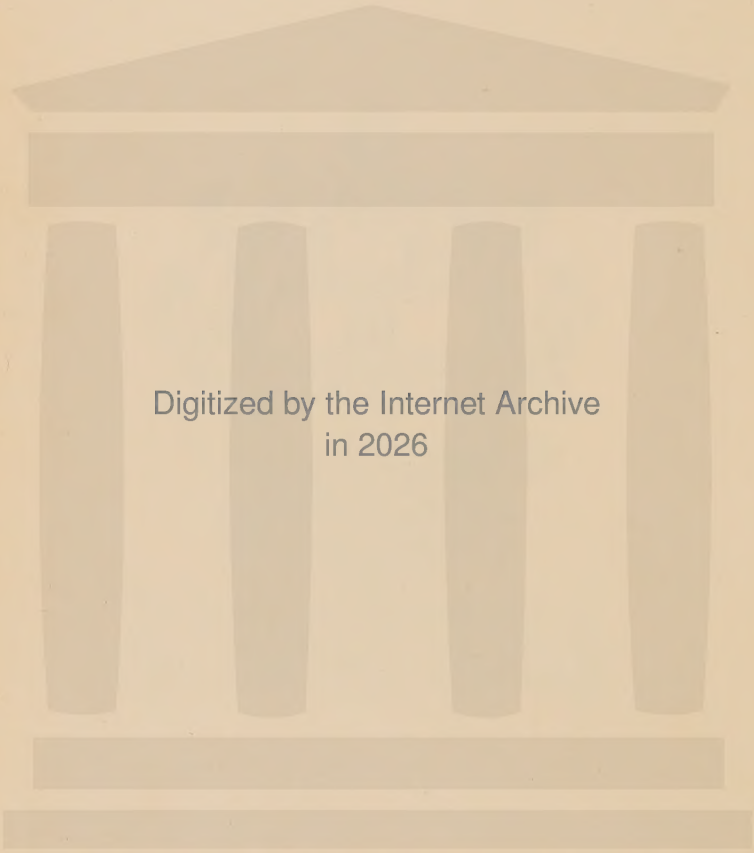
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

ATTORNEY-GENERAL *v.* GREAT WESTERN RAILWAY COMPANY.

1924
Jan. 18.

Railway—Liability for Damage—Sparks from Engine—Fire on adjoining Land—Absence of Negligence—Compensation—Damage exceeding statutory Amount—Limitation of Claim—Form of Notice and Particulars—Alternative Claims—Railway Fires Act, 1905 (5 *Edw.* 7, *c.* 11), *s.* 1, *sub-ss.* 1, 3; *s.* 3.

The Railway Fires Act, 1905, provides: Sect. 1: "(1.) When .... damage is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage.

"(3.) This section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed one hundred pounds."

Sect. 3: "This Act shall not apply in the case of any action for damage

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by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage" :—

Held, that the fact that the actual damage caused to the land by the fire exceeds 100*l.* does not prevent the owner of land from maintaining an action under the Act, in which the claim for damage does not exceed that amount.

Held, also, that it is not necessary to the validity of either the notice of claim or the particulars of damage under s. 3 of the Act, that the document should appear upon the face of it to be given under the Act, or should even be intended by its framer to be given under the Act.

Held, further, that the fact that the claimant in his notice of claim and particulars of damage states that the damage to his land amounts to a sum exceeding 100*l.* does not prevent him from afterwards bringing an action for damage under the Act in which the claim does not exceed that figure.

Semble, that a person to whose land damage has been caused by fire arising from the locomotive engine of a railway company is entitled in one action against the company to join a claim for damage by the alleged negligence of the company and a claim for compensation under the Act.

INFORMATION on behalf of the Crown.

On July 20, 1921, a locomotive engine belonging to the defendants, the Great Western Railway Company, while drawing a train along their line from Speech House Road station to Drybrook Road Station, emitted sparks which caused fire to break out in Beechenhurst Enclosure, a part of the Forest of Dean, under the management of the Commissioners of His Majesty's Woods and Forests, whereby damage was done.

On July 22, 1921, the deputy surveyor for the Forest of Dean, on behalf of the Commissioners, wrote to the divisional engineer of the defendants in these terms : "I beg to notify you that a fire occurred in Beechenhurst Enclosure on Wednesday, 20th July, which destroyed over one hundred acres of wood. The fire was caused by sparks from the engine of the 12.40 P.M. train ex Speech House Road station igniting the grass in three places inside the Enclosure and in one place on the company's ground. Details and estimate of damage which will be claimed from the company will be forwarded later." In that letter a formal report of the fire was enclosed.

On July 30, 1921, the deputy surveyor on behalf of the Commissioners wrote to the divisional engineer of the defendants as follows: "Fire in Beechenhurst Enclosure. In accordance with my letter dated the 22nd inst., I am now in a position to state the amount of the claim for this damage done by the above fire. The figure is . . . . 3475*l.* 12*s.* On behalf of the Commissioners of H.M. Woods and Forests I therefore claim this amount from the railway companies concerned." That letter was accompanied by a lengthy statement setting forth the details of alleged damage and their estimated values, amounting in all to the above sum, and concluding with the observation that the claim against the railway company was therefore of that amount.

On September 19, 1921, the solicitor of the Commissioners wrote to the representative of the defendants stating that the claim made on behalf of the Commissioners was on the ground that the fire was occasioned by negligence of the defendants. On February 22, 1922, the representative of the Commissioners wrote to the representative of the defendants stating that from the particulars it would be observed that the total loss amounted to no less than the amount there mentioned; that under the Railway Fires Act, 1905 (1), the amount of compensation that could be recovered in the absence of proof of negligence was limited to 100*l.*, which it must be admitted was a negligible sum in comparison with the actual damage caused. On July 20, 1922, the deputy surveyor wrote to the representative of the defendants stating that his department did not desire to raise any issue of "negligence" in the legal sense to substantiate the original claim; and that he thereby claimed the maximum amount of compensation which he was allowed to claim by the Act—namely, 100*l.* On July 26, 1922, the solicitor of the defendants wrote to the solicitor of the Commissioners stating that until the receipt of the letter last above mentioned the only claim put forward was one founded on the negligence of the defendants, and that the principles of Channell J.'s judgment in *Martin* v. *Great Eastern Ry.*

(1) The material provisions of the Act are set out above in the headnote.

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Co. (1) governed the present case. On July 27, 1922, the solicitor of the Commissioners wrote to the solicitor of the defendants, stating that the notices of July 22 and July 30, 1921, appeared to dispose of any objection as to non-compliance with the requirements considered in *Martin* v. *Great Eastern Ry. Co.* (1). On July 31, 1922, the solicitor of the Commissioners wrote to the solicitor for the defendants formally disclaiming on behalf of the Commissioners any claim for damage against the defendants in excess of 100*l.* In August, 1922, the solicitor of the defendants replied that it did not appear to him that the formal disclaimer in the last preceding letter affected in any way the legal position of the parties under the Act, and that he should advise his clients to defend any proceedings which the Commissioners might initiate against them.

An information dated February 16, 1923, was laid by the Attorney-General on behalf of the Crown, informing the Court of the above-stated facts in regard to the fire, and claiming 100*l.* compensation for the said damage.

The defendants in their defence stated (inter alia) (2.) that the said engine was used under statutory powers and without negligence and in the ordinary and normal use of the defendants' railway; and that no negligence was alleged; (3.) that the claim for damage and/or the amount of the damage caused by the fire exceeded 100*l.*; and (4.) that the provisions of s. 3 of the Act of 1905 had not been complied with in that no notice of claim and particulars of damage in writing within the meaning of that section were sent to the defendants within the respective times specified therein.

The parties agreed to admit the correspondence; and also the following facts—namely, that the land in question was at all material times part of the possessions of His Majesty under the management of the said Commissioners, and was agricultural land as defined in the Act of 1905; that damage exceeding 100*l.* was caused to the said land by fire arising from sparks or cinders emitted from a locomotive engine belonging to the defendants and used on their railway between the

(1) [1912] 2 K. B. 406.

stations aforesaid; that the said engine was being used by the defendants under their statutory powers and without any negligence in the ordinary and normal use of their railway.

Sir Douglas Hogg A.-G. and *Sir Harold Smith K.C.* for the informant.

Barrington-Ward K.C. and *Wilfrid Lewis* for the defendants.

[The arguments of counsel appear below from the judgment of McCardie J. In the course of the discussion reference was made to *Martin* v. *Great Eastern Ry. Co.* (1)]

McCARDIE J. This case raises several novel points under the Railway Fires Act, 1905. The facts are not in dispute. In July, 1921, a fire occurred upon Crown property, which was agricultural land within the Act, and did damage to that property which largely exceeded the sum of 100*l.* The fire arose through sparks which were emitted from one of the defendants' engines working under statutory powers, and without negligence. Immediately after the fire arose the plaintiffs sent a notice to the defendants, the Great Western Railway Company, dated July 22, 1921, in these terms: [His Lordship read the notice and continued:] On July 30, 1921, the plaintiffs sent to the defendants a letter making a figured claim for 3475*l.* 12*s.* in these terms: [His Lordship read that letter.] They attached to that letter a large number of most carefully prepared details, and at the conclusion of the details they said: "The claim entered against the railway company for the fires started by sparks from one of their engines on July 20, 1921, resulting in the above damage, is therefore 3475*l.* 12*s.*" I should add that it is plain that, from the outbreak of the fire onwards, for some months, the Crown were basing their claim against the defendants upon negligence in the working of the engine. Those are all the material facts.

Mr. Barrington-Ward, for the defendants, has taken several points which have been well argued by counsel on both sides.

(1) [1912] 2 K. B. 406.

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The Act of 1905 was passed for a well-known purpose. Before the passing of that Act it was essential that a plaintiff whose crops or barns were injured by sparks from a railway company's engine should prove negligence on the part of the company, which it was often difficult and costly, and sometimes impossible to establish. The object of the Act was to make the railway company liable, even though they were not guilty of any negligence whatever, provided that they were not to be responsible for more than 100*l.* damage. Sub-s. 1 of s. 1 creates the liability of the railway company, and sub-s. 3 says: "This section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed one hundred pounds." I will refer later to the curious wording of that sub-section, which at once strikes the eye of the reader.

The Act imposes upon a plaintiff certain conditions precedent. Sect. 3 provides that the Act shall not apply in the case of any such action "unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage." The only previous case under this Act, so far as I am aware, is one dealing with a point arising under that section. That case is *Martin* v. *Great Eastern Ry. Co.* (1), before Channell J., in which that learned and distinguished judge ruled that in order that the particulars should be particulars of damage within s. 3 they must contain a statement of the amount claimed against the railway company. I think that the decision in that case is limited strictly to that point only.

The several questions that have been argued before me are, I think, by no means free from difficulty. I shall state as concisely as possible my view upon each of them.

The first question is one of practice—namely, whether it is permissible for a plaintiff to join in one action a claim for damages for the negligence of the railway company, and a claim for compensation under the Act of 1905. That question

(1) [1912] 2 K. B. 406.

is not perhaps strictly before me, but, as it seems desirable to do so, I will now briefly express my view upon it. In my opinion there is nothing whatever either in good sense or in law to prevent a joinder upon one writ of summons of these two claims, and I should certainly rule that it could properly be made.

The next question that arises is whether the Act applies where the actual damage exceeds 100*l*. In the present case it is admitted that the damage very largely exceeded 100*l*., amounting in fact to over 3000*l*. Mr. Barrington-Ward says that as the actual damage which has fallen on the plaintiff through the fire exceeds 100*l*. in fact, the Act does not apply at all, and the plaintiff can get no compensation whatever under its provisions. According to that contention, if, after full investigation, it were found that the damage actually sustained amounted to any sum exceeding 100*l*. say to 105*l*., then the plaintiff apparently would be wholly defeated, and would have to pay the costs of his action. In my opinion, that is not the correct view. I do not think it matters whether the actual damage be less or more than 100*l*. The question is not what is the amount of the actual damage, but what is the amount of the claim that is finally made against the defendant company, and, therefore, in my view, it is immaterial that the actual damage here was largely in excess of 100*l*.

Another question is whether the notice and particulars of damage must on the face of them appear to be given under the Act of 1905. Mr. Barrington-Ward says that the notice of July 22 and the particulars of damage of July 30, 1921, which mention the particular amount of 3000*l*. odd, are not documents complying with s. 3, because they do not purport to be given under the provisions of the Act. It is true that those documents do not refer to the Act, and I may say further that I conceive it to be doubtful whether at the time when these documents were framed the plaintiffs, the Crown, had the Act in mind. I am satisfied, however, that subject to the amount, those documents in fact comply with the requirements of s. 3, and, that being so, in my opinion, it is immaterial

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whether the documents expressly refer to the Act or what may have been in the mind of the person who framed them. In other words, even though the Act of 1905 is not mentioned and was not in the mind of the writer of the letters, yet if the letters comply with the provisions of the statute, they are documents within s. 3.

A further question is whether the fact that a plaintiff has stated in his notice of claim and particulars of damage that his damage exceeds 100*l.* prevents him from afterwards commencing an action under the Act in which his claim for damage does not exceed that figure. Mr. Barrington-Ward says that even though in the present case these documents may prima facie appear to be within s. 3, yet the particulars of damage are not in accordance with that section, because they claim more than 100*l.*—namely, 3400*l.* This is obviously a point of much practical importance in view of the wide operation of the Act of 1905. I can see no reason why the plaintiff should be necessarily bound by the amount that he has mentioned in his document, and in my view the wording of the statute does not support the contention of the defendants. If the Legislature had had the intention which the defendants desire me to attribute to it, s. 1, sub-s. 3, would have been worded, I think, in some such way as this: This section shall not apply in the case of any claim for damage where the notice of claim or particulars ask for more than 100*l.* The sub-section, however, is worded in a very different and as I said before in a somewhat striking fashion. It makes no reference whatever to the amount that is to be mentioned in the notice of claim or in the particulars of damage. It says: "This section shall not apply in the case of any action for damage, unless the claim for damage in the action does not exceed one hundred pounds." I can see nothing in good sense which should preclude a man who happens to have sent in a notice of claim for 150*l.*, and particulars of actual damage amounting to that sum, from afterwards saying that he is satisfied that he cannot get that sum because of the words of the Act, or because he cannot prove negligence, but that he desires to get what the Act intended

to allow him, and that he gives particulars of the actual damage suffered and that he claims 100*l.* in the action. I see no hardship upon the defendants in these circumstances, because the particulars under s. 3 must give them an adequate notion of the general nature of the case and the extent of the damage, and the writ must give them notice that 100*l.* only is claimed against them. Therefore, in my opinion, these various points raised on their behalf fail the defendants.

I ought to add that counsel have been good enough to call my attention to the recent Railway Fires Act (1905) Amendment Act, 1923, which to some extent affects the procedure under the Act of 1905; but I am unable to derive from that more recent statute anything which throws light upon the true construction of the Act of 1905.

In my opinion, therefore, the Crown must receive the judgment of the Court.

Judgment for Crown.

Solicitor for informant: *Frank A. Jones.*
Solicitor for defendants: *A. G. Hubbard.*

J. R.

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Feb. 5, 6.

[IN THE COURT OF APPEAL.]

BOURNE *v.* LITTON.

[1923. B. 704.]

Landlord and Tenant—Rent Restriction—Increase of Rent—Notice of Intention to increase—Amount of Increase—Liability for Part of Repairs—Agreement of Amount—Determination of County Court—Condition precedent—Validity of Notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*d*) (*ii.*), *sub-s.* 6; *s.* 3, *sub-s.* 2; *Sch. I.*

Where the landlord of a dwelling house, to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, gives notice of intention to increase the standard rent by the lesser sum mentioned in s. 2, sub-s. 1 (*d*) (ii.), of the Act, and the amount of the increase has neither been agreed between the parties nor determined by the county court, the notice is neither in the form in the First Schedule to the Act nor in a form substantially to the same effect and is therefore not a valid notice under s. 3, sub-s. 2, and the increase is not due or recoverable.

The landlord of a dwelling house to which the Act applied claimed to increase the rent above the standard rent by 15 per cent. of the net rent under s. 2, sub-s. 1 (*c*) (which was not objected to), and by a further 15 per cent. of the net rent under s. 2, sub-s. 1 (*d*) (ii.). On August 24, 1922, he served on the tenant a notice in writing of his intention so to increase the rent, and for non-payment of the increased rent, which he alleged to be due and payable on December 25, 1922, he brought an action in the High Court for arrears of rent, possession, and mesne profits since that date.

At the date of serving notice of intention to increase the rent the amount claimed under s. 2, sub-s. 1 (*d*) (ii.), had neither been agreed between the parties nor determined by the county court:—

Held, by Bankes and Scrutton L.JJ. (Sargant L.J. dissenting), that the notice was not a valid notice within s. 3, sub-s. 2, and that, the increased rent not being due or recoverable, the action failed.

Quaere whether in view of s. 2, sub-s. 6, proceedings were properly instituted in the High Court.

Judgment of Greer J. [1924] 1 K. B. 231 affirmed.

Appeal from the judgment of Greer J. (1) in an action tried before the learned judge without a jury.

The plaintiff, who was the owner of a house, No. 16 Trebovir Road, Earl's Court, London, claimed against the defendant, who was the tenant of the house, possession, 33*l.* 5*s.* arrears of rent, and mesne profits at the rate of

(1) [1924] 1 K. B. 231.

133*l.* per annum from December 25, 1922. The plaintiff's claim to possession was based on the non-payment of the sum of 33*l.* 5*s.*, which he alleged became lawfully due on December 25, 1922.

The defendant became tenant of the house on June 8, 1917, for one year from September 29, 1917, at a rent of 120*l.* a year, with an option which she duly exercised to continue the tenancy for three years from September 29, 1918, at a rent of 100*l.* a year. By agreement between the defendant and the plaintiff's predecessors in title she undertook to pay a rent of 105*l.* a year for the three years ending on September 29, 1922, and was granted a further tenancy which terminated on that date.

The plaintiff purchased the property by contract on July 27, 1920, and the same was duly assigned to him on August 8, 1922.

By her tenancy agreement the defendant agreed to do extensive internal repairs to the premises, and not to use or allow them to be used for any trade or business, and not to use or allow them to be used otherwise than as a private dwelling house without the previous consent in writing of the landlords, and not to assign or underlet the premises without the consent in writing of the landlords, such consent not to be arbitrarily withheld. The agreement also contained a proviso for re-entry in case the rent was in arrear for twenty-one days.

The defendant occupied three rooms in the house as a residence for herself when she was in London, and she sublet the rest of the house to others, and with her knowledge and consent one room in the house was used for dances and for a short time for the teaching of dancing.

On May 2, 1921, after the defendant had become tenant to the plaintiff and paid rent to him, the plaintiff served on the defendant a notice to increase the rent by the amount of 19*l.* per quarter. This notice treated the premises as business premises and asked for an increase of 35 per cent. on that ground under s. 2, sub-s. 1 (*c*), of the Rent (Restrictions) Act, 1920, and for an increase of 6*l.* 17*s.* 6*d.*, being 25

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per cent. on the net rent of the premises under s. 2, sub-s. 1 (*d*), of the Act. On February 23, 1922, he served a further notice claiming an increase of 15 per cent. under s. 2, sub-s. 1 (*c*), and 25 per cent. under sub-s. 1 (*d*), the 25 per cent. in these two notices being claimed upon the assumption that the landlord as landlord did all the repairs.

On August 24, 1922, the plaintiff sent to the defendant a further notice claiming 15 per cent. increase under sub-s. 1 (*c*), which was admittedly in order, and 15 per cent. under sub-s. 1 (*d*). At the time this notice was served no agreement had been come to between the plaintiff and the defendant under s. 2, sub-s. 1 (*d*), of the Act of 1920 (1) with reference

(1) By s. 2, sub-s. 1 (*d*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the amount by which the increased rent of a dwelling house to which the Act applies may exceed the standard rent shall be (in addition to other permitted increase) (i.) where the landlord is responsible for the whole of the repairs, an amount not exceeding 25 per cent. of the net rent; "or (ii.) where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court to be fair and reasonable having regard to such liability."

By sub-s. 6: "Any question arising under sub-s. . . . . 2 . . . . of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive."

By s. 3, sub-s. 2: "Notwithstanding any agreement to the contrary, where the rent of any dwelling house to which this Act applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks . . . . after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect . . ."

The form in the First Schedule, after the date and the name of the tenant and the address of the premises to which the notice refers have been stated, is to the following effect: "Take notice that I intend to increase the rent of *l. s. d.* per at present payable by you as tenant of the above-named premises by the amount of *l. s. d.* per . The increase is made up as follows: . . . . (*d*) *l. s. d.*, under paragraph (*d*) of s. 2, sub-s. 1, of the Act, being per cent. on the net rent of the premises. The net rent is *l. s. d.* The standard rent is *l. s. d.* . . . . The increase under head (*d*) is on account of my responsibility for repairs, for part only of which you are under an express liability." . . . .

NOTE.—"Where the tenant is under an express liability for part of the repairs, the increase under head (*d*) is to be settled in default of agreement by the county court."

to the amount which the landlord was entitled to claim as being responsible for part only of the repairs, and no application had been made to the county court under s. 2, sub-s. 6, of the Act, to determine what was fair and reasonable having regard to the landlord's liability; but after the notice had been served correspondence took place between the plaintiff and his solicitors and the defendant and her solicitors which it was alleged amounted to an agreement that 15 per cent. was the amount by which the plaintiff was entitled to increase the rent by reason of his responsibility for repairs, and reliance was placed particularly on two letters from the defendant's solicitors to the plaintiff's solicitors, one dated October 25, 1922, and the other dated November 14, 1922.

The letter of October 25 contained the following passage: "As from September 29 last our client will be prepared to pay rent at the rate of 133*l.* per annum, in accordance with the notice served upon her by your client under the Rent (Restrictions) Act, but this renders the landlord liable to do the repairs to the premises, and we must ask him to be good enough to carry these out at once, otherwise our client will be under the necessity of communicating with the sanitary inspector to see that they are carried out." The letter went on to refer to a sanitary inspector's notice which had been served on the premises and to the inspector's view that the work should be carried out by the plaintiff and to his alleged intention to take proceedings if the plaintiff did not comply with the notice.

The plaintiff's solicitors replied on October 30: "With regard to the sanitary notice recently served, this would seem to be the tenant's liability. She has agreed to pay a net rent free from all deductions and to pay outgoings of every description."

The letter of November 14 from the defendant's solicitors contained this paragraph: "We have already informed you that if our client is to continue tenant of your client's premises it will be upon the conditions previously stated, viz., payment of rent of 133*l.* per annum."

The defendant contended that the notice of August 24,

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1922, was not a valid notice under s. 3, sub-s. 2, of the Rent (Restrictions) Act, 1920, because there had been neither an agreement nor a determination by the county court concerning the amount by which the plaintiff claimed to increase the rent; and that she was therefore a statutory tenant at the rent of 105*l*.

Greer J. gave judgment for the defendant.

The plaintiff appealed.

G. W. Powers for the appellant. There is no express provision in the Act making an agreement between the parties or a determination by the county court a condition precedent to the validity of a notice under s. 3, sub-s. 2, of the Act. By s. 2, sub-s. 1 (*d*) (ii.), the standard rent may be increased by such sum—not as shall have been agreed or determined, but as may be agreed or may be determined by the county court. The notice is to be in the form contained in the First Schedule to the Act or in a form substantially to the same effect. The only mention of an agreement or determination in the Schedule is in the note, which says that where the tenant is under an express liability for part of the repairs the increase under head (*d*) " is to be settled in default of agreement by the county court." The words would have been " must have been settled " if it had been intended that the agreement or determination was a condition precedent to the landlord's right to increase the standard rent. Indeed if that were the intention the note would be wholly superfluous. Much reliance was placed by the learned judge on the judgment of Salter J. in *Penfold* v. *Newman* (1); but in that case s. 2, sub-s. 1 (*d*), was not under consideration; the case turned upon sub-s. 1 (*c*), and the notice was bad, because the increase claimed was 15 per cent. of the net rent when no more than 5 per cent. was permitted by the Act. Salter J. decided that the notice must be valid in substance as well as in form and that it is not valid unless it claims an increase which the landlord has a legal right to claim. The learned judge did not purport to decide the question which is raised

(1) [1922] 1 K. B. 645.

in this case—namely, whether the increase is or is not one which the landlord has a legal right to claim. The other point decided in *Penfold* v. *Newman* (1) was that a notice originally invalid cannot be validated by subsequent amendment. Upon this point the decision has been doubted by the Court of Appeal of Southern Ireland in *Elliott* v. *Ellis*. (2) The letters of October 25 and November 14, 1922, show that the amount of increase claimed by the plaintiff was agreed to by the defendant.

Hilbery for the respondent. A landlord has no power to increase the standard rent except upon the terms and conditions imposed by the Act. One of these conditions is contained in s. 3, sub-s. 2—namely, that a valid notice in writing in the form contained in the First Schedule to the Act, or in a form substantially to the same effect, has been served by the landlord upon the tenant. The form in the Schedule prescribes that the actual amount shall be claimed in so many pounds, shillings, and pence under head (*d*), which is this case; and it specially provides in a note that the increase under head (*d*) is to be settled in default of agreement by the county court. It follows that before the notice is served the amount claimed therein must have been arrived at either by agreement or by the determination of the county court. If not, the notice is not a valid notice within s. 3, sub-s. 2, and therefore the increased rent is not due or recoverable. Further, even if the notice could be validated by a subsequent agreement, there was no such agreement in this case.

Powers in reply.

BANKES L.J. The plaintiff sued to recover possession of the dwelling house on the ground that the tenant had failed to pay a quarter's rent and he also claimed 33*l*. 5*s*. as the quarter's rent in arrear and mesne profits at the rate of 133*l*. a year. The defendant insisted that she was a statutory tenant at a rent of 105*l*. a year, and that she was always ready and willing to pay that rent, and that the

(1) [1922] 1 K. B. 645. (2) [1923] 2 I. R. 45.

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plaintiff had no right to any increase beyond that rent. The action was fought on the assumption that the tenant was under an obligation to do certain repairs to the house and that the landlord was bound to do other repairs. I express no opinion whether that was the true view of their respective rights and liabilities, but I treat the parties as asking to have their rights adjusted upon that basis.

To justify the increase of rent the landlord must show that the increase was authorized by the Rent (Restrictions) Act, 1920. There are two material sections. The first is s. 2, sub-s. 1 (*d*), which provides for two cases (i.) where the landlord is responsible for the whole of the repairs, in which case he may increase the standard rent by an amount not exceeding 25 per cent. of the net rent; and (ii.) where the landlord is responsible for part and not the whole of the repairs, in which case he may increase the standard rent by "such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court to be fair and reasonable having regard to such liability." This case therefore is one in which, if the landlord was entitled to make any increase, it would be by the lesser sum either as agreed between the parties or as determined by the county court to be fair and reasonable.

The other material section is s. 3. Assuming that the landlord is justified in other respects in demanding an increase under one or more of the headings in s. 2, yet by s. 3, sub-s. 2, "No such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks . . . . after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect." Plainly therefore it is a condition precedent to the right to claim any increase that the landlord should have served a notice in writing in the form in the Schedule or in a form substantially to the same effect. It is very important to observe what the form in the Schedule requires.

It demands great particularity in pounds, shillings, and pence in the statement of the amount claimed and a detailed explanation of the way in which it is arrived at and clear information of the time when it becomes payable. It runs thus: "Take notice that I intend to increase the rent of *l. s. d.* per at present payable by you as tenant of the above named premises by the amount of *l. s. d.* per . The increase is made up as follows:—" (taking the first heading as an example of the particularity required) " *l. s. d.* under paragraph (*a*) of sub-s. 1 of s. 2 of the Act, being six [eight] per cent. on *l. s. d.* expended by me since [insert date] on improvements and structural alterations and consisting of * " Then there is a footnote: " * Here state improvements and alterations effected." No more detailed statement could be imagined. I now refer to heading (*d*) of the notice, which is the heading appropriate to the present case, because it relates to the cases (i.) where the landlord is responsible for the whole and (ii.) where he is responsible for part only of the repairs. The notice says: "The increase is made up as follows: . . . . (*d*) *l. s. d.* under paragraph (*d*) of sub-s. 1 of s. 2 of the Act, being per cent. on the net rent of the premises. The net rent is *l. s. d.* The standard rent is *l. s. d.*

" † The increase under head (*d*) is on account of my responsibility for repairs, for no part [part only] of which you are under an express liability." A footnote † is appended, which says: "Where the tenant is under an express liability for part of the repairs, the increase under head (*d*) is to be settled in default of agreement by the county court." "The increase under head (*d*)" refers to an increase which has been stated in pounds, shillings, and pence. That increase by the terms of the form of notice "is to be settled in default of agreement by the county court." I fail to see how a notice can be in accordance or substantial accordance with that form unless it states without qualification an actual amount which has been arrived at by agreement or by the determination of the county court. If the notice fails to fulfil that condition precedent it is not a valid notice under

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s. 3, sub-s. 2, of the Act. It follows that the judgment of Greer J. in the present case was right.

In my opinion the construction placed on the Act by Salter J. in *Penfold* v. *Newman* (1) was also right. It is true that the particular clause dealing with the increase of rent because of the landlord's obligation to repair was not under consideration in that case; but the general conclusion at which Salter J. arrived is stated in these words: (2) "In my opinion a notice of increase of rent is not a valid notice under the Act unless the increase which it states is an increase which the landlord has a legal right to claim." By the word "increase" the learned judge means the actual amount. With that view I agree, as Greer J. also agreed.

It is said that this adds another difficulty to the position of a landlord; but the difficulty is more imaginary than real. In practice the landlord will inquire of the tenant whether he agrees to a particular amount of increase; if the tenant will not agree the landlord will apply to the county court to have the reasonable amount fixed. That will end the dispute, for the tenant is not likely to make a second application necessary. On the other hand if a landlord may serve his notice before the amount is ascertained the tenant is likely to dispute the amount and to bring the landlord before the county court to have it fixed. The only difference will be that the landlord will go himself, instead of being taken by the tenant, before the county court.

One other point I mention for the purpose of reserving it for further consideration—namely, whether in view of s. 2, sub-s. 6, the High Court had any jurisdiction to entertain the question at all. Upon the other point I agree with the judgment of Greer J., and the appeal must be dismissed.

SCRUTTON L.J. It is important to observe that this case arises under the Act of 1920 and not under the Act of 1923. Sects. 6 and 11 of the later Act might have led to a different result, for they give power to the county court to correct

(1) [1922] 1 K. B. 645. (2) [1922] 1 K. B. 655.

errors and supply omissions due to bona fide mistake on the part of the landlord.

The appellant is the landlord and the respondent is the tenant. The appellant began in May, 1921, by giving a notice to increase the rent by 35 per cent. under the head of rent and 25 per cent. under the head of repairs, to date from September 29, 1921. Subsequently he felt misgivings about the validity of that notice, so without withdrawing it, he gave another notice in February, 1922, to increase the rent from March, 1922, by 15 per cent. under the head of rent instead of 35 per cent., and by 25 per cent. under the head of repairs. Then he thought both these notices might be wrong, and so on August 24, 1922, while still maintaining both the other notices, he served a third notice without prejudice to his claim for increased rent previously demanded from September, 1921, and to his claim for possession for non-payment of that rent. In this third notice he claimed to increase the standard rent by 15 per cent. under the head of rent and 15 per cent. under the head of repairs. That referred to s. 2, sub-s. 1 (*d*), of the Act of 1920. As a matter of fact when the appellant gave this third notice neither had he agreed with the respondent what the amount of the increase should be nor had either party applied to the county court to fix a fair and reasonable amount, and so the amount of increase had not been fixed.

Now the statute provides that in certain events a landlord may have an increase of rent above the standard rent within prescribed limits and under prescribed conditions. He must state to the tenant, some time before the increased rent becomes payable, clearly and exactly what he proposes to do, and the form in the First Schedule to the Act specifies with minute particularity what the landlord must tell the tenant before he can increase the rent. He must tell him the exact amount down to a penny. Then by s. 2, sub-s. 3, no increase of rent shall be due or recoverable until four clear weeks after the landlord has served upon the tenant "a valid notice in writing" of his intention to increase the rent. In my opinion this third notice was not a valid notice, inasmuch as it claimed

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an increase which had not been ascertained either by agreement between the parties or by the determination of the county court. The Act contains no provision that an invalid notice can be validated by a subsequent agreement or determination. In substance *Penfold* v. *Newman* (1) is a decision that it cannot. I agree with the judgment of Salter J. in that case. We have been referred to a decision of the Irish Court of Appeal in *Elliott* v. *Ellis* (2) in which *Penfold* v. *Newman* (1) was doubted. It is unnecessary to say that we pay the greatest respect to the decision of a co-ordinate Court whether in Ireland or in Scotland upon a statute which affected the United Kingdom. In *Elliott* v. *Ellis* (2) Molony C.J. delivered a judgment and was authorized to say that the other two judges who were not present concurred in the result; but whether they concurred with the reasons of the Lord Chief Justice or for other reasons of their own it is impossible to say. Speaking for myself and with all respect I do not find that the importance of a valid notice was alluded to. In *Penfold's Case* (1) I do find a reasoned consideration of the word "valid" by Salter J. with which I am disposed to agree. Consequently I do not share the doubt which the Court of Appeal of Southern Ireland entertains of *Penfold's Case.* (1) On the contrary I doubt the decision of the Irish Court and do not propose to follow it.

This is enough to dispose of the case, for if the date of service is the time to judge of the validity of the notice, this notice was clearly invalid when it was served. The prescribed form of notice makes it impossible to say that a document in the form: "Take notice that I hereby increase your rent by such an amount as the county court judge may hereafter determine" would be a valid notice.

It is unnecessary then to decide the other points raised. If the respondent had subsequently agreed that an increase of 15 per cent. of the net rent was correct I do not think that would validate the notice; but neither do I think there was any subsequent agreement. I cannot spell out

(1) [1922] 1 K. B. 645. (2) [1923] 2 I. R. 45.

of the correspondence such an offer and acceptance as would constitute a contract. I agree that the appeal should be dismissed.

SARGANT L.J. read the following judgment: I differ with much hesitation from the opinion of Greer J. and the Lords Justices, but I have come to a definite conclusion and I am bound to state it.

The notice is said to be bad on two grounds, one of general importance, the other depending on the particular circumstances of the case. The first ground is that there had not been before the notice any agreement or determination by the county court concerning a fair and reasonable increase in view of the liability of the landlord. It is said that an agreement or determination is a condition precedent to the giving of a notice and that no subsequent agreement by the tenant can cure the defect in the notice. The second ground is that in this case no agreement was made even after the service of the notice.

Upon the first point, there are in my view many indications in the Act that the agreement or determination is not necessarily a condition precedent, but may be, and indeed is in general expected to be, subsequent to the notice. The words of s. 2, sub-s. 1 (*d*) (ii.), are "may be agreed or may be determined" not "may have been agreed or may have been determined," which would have been the appropriate words for a condition precedent. The words seem to me to point to something future, something yet to be done. Secondly there is nothing to indicate that the process under (*d*) (ii.) is necessarily more elaborate or cumbrous than that under (*a*), (*b*), (*c*), or (*d*) (i.). Yet if the contention of the tenant is correct there would have to be in cases under *d* (ii.) two distinct steps—namely, first a negotiation with the tenant, or a proceeding in the county court, or both, and secondly the service of a notice embodying the result of the negotiation or determination as regards this item of increase. And it is not immaterial to observe that the result would be that, in all cases under para. (*d*) (ii.), the alternative periods of four

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weeks or one week, within which the landlord is to be able to secure his increase, would be largely extended. And thirdly the form in the First Schedule to the Act tends strongly in the same direction, for in the scheduled notice not only is the same form given for both sub-heads (i.) and (ii.) of head (*d*), but the sentence beginning "The increase under head (*d*)" reads queerly if applied to an increase already agreed on or determined. And the footnote that in cases within (*d*) (ii.) the increase is to be settled in default of agreement by the county court, is expressed in terms of futurity and points to something subsequent. Had it been intended that in cases within (*d*) (ii.) the notice should refer to something already effected the note would, I think, have run "The increase under head (*d*) will be that agreed on or settled in default of agreement by the county court."

There is also this general consideration apart from the special language of the Act—namely, that in general, where a question is made or left as subject matter of agreement between parties, that agreement is prima facie such as may be made at any time either before or subsequently.

Great stress was however laid on the requirement of s. 3, sub-s. 2, of the Act, that the landlord must have served a valid notice in writing, the word "valid" being an addition to the requirement under the earlier Act. To my mind this affords little help to the construction of (*d*) (ii.). If that sub-head contemplates or includes a future agreement or determination then the notice is valid. If it does not the notice is invalid. The defects to which "valid" in s. 3, sub-s. 2, refers appear to be such as those indicated in s. 3, sub-s. 1, and s. 3, sub-s. 3.

It has been suggested that s. 2, sub-s. 6, of the Act points to a prior application to the county court under (*d*) (i.). But to me the words seem to refer more naturally to an application to the Court when the parties have failed to come to an agreement under head (*d*) (ii.) after the service of the notice. And I fail to see how any difficulty can arise if after service of the notice an application to the county court is not determined in four weeks. All that will happen is that the

landlord's claim will be in abeyance for the time being and until determination. The result of holding that the agreement or determination must be prior to the notice will apparently be this:—The landlord will have in cases within paragraph (*d*) (ii.) to send the tenant a proposed notice of increase and to ask if he agrees to the proposed increase in respect of repairs. Then if the tenant disagrees or fails to answer (which will probably happen in most instances) the landlord will have to bring him before the county court in the matter of the proposed notice for the purpose of determining whether the proposed increase for repairs in that proposed notice is proper. And it will only be after this that the actual notice can be served. Such an application to the county court in respect of a proposed notice would be rather a quaint one, and it seems to me more reasonable to suppose that s. 2, sub-s. 6, points to an application after the question between the parties has been focussed by the delivery of a notice than to an application in respect of an intended notice suggesting a possible increase. The view which I have expressed is in no way inconsistent with *Penfold* v. *Newman* (1) or with the view there expressed by Salter J. that to be valid a notice under the Act must be correct both in form and in substance. If my reading of para. (*d*) (ii.) is right this notice is valid in both respects. In my opinion the decision in *Penfold* v. *Newman* (1) gives no assistance in the present case. I agree in this respect with the decision of the Court of Appeal of Southern Ireland in *Elliott* v. *Ellis* (2).

I may add that I deplore the decision now being arrived at on the first part of this case, because it places an additional and, I think, illogical obstacle in the way of a landlord seeking to make a perfectly just addition to rent in respect of the increased cost of repairs, and I cannot find that the creation of this extra obstacle has been expressly or clearly indicated by the legislation in question. It will, I think, make a great practical difference whether the landlord has to go to the county court initially or will only have to appear there if the tenant takes him there.

(1) [1922] 1 K. B. 645. (2) [1923] 2 I. R. 45.

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As regards the second point, I will say very little since it only touches this particular case, and in the circumstances my view will have no effect. In my judgment on the correspondence the parties did come to an agreement upon this item, which is what the statute requires. I read the words in the letter of October 25, 1922, "but this renders the landlord liable to do the repairs to the premises," not as introducing a condition but as calling attention to the fact that the Act imposes certain liabilities on the landlord. And I think that the matter is clinched by the last paragraph of the letter of November 14, 1922, "We have already informed you that if our client is to continue tenant of your client's premises, it will be upon the condition previously stated, namely payment of the rent of 133*l.* per annum, that rent including the particular sum demanded in respect of repairs."

For these reasons I think that this appeal should be allowed.

Appeal dismissed.

Solicitors for appellant: *Seattle & Morrison.*

Solicitors for respondent: *Valpy, Peckham & Chaplin.*

W. H. G.

ATTORNEY-GENERAL *v.* ASSHETON-SMITH AND OTHERS.

1924
March 4, 5, 10.

Revenue—Succession Duty—Tenant for Life—Tenant in Tail—Disentailing Deed—Settlement—Jointure in Favour of Widow of Tenant for Life—"Alienation" or "new Succession"—Rate of Duty—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

Real estate stood limited to a tenant for life with remainder in tail to his son under the will of a stranger in blood. The tenant for life and tenant in tail executed a disentailing deed and resettled the estate, the settlement providing for the payment of a jointure rentcharge to the widow of the tenant for life. The tenant for life died in September, 1914, whereupon his son became entitled in possession but he died in October, 1914, before the first instalment of succession duty became payable. The Crown now claimed succession duty at the rate of 10 per cent. on the value of the jointure rentcharge, being the rate at which duty would have been payable by the son if the rentcharges had not been vested in the jointress:—

Held, that the jointress took, not by way of alienation within s. 15 of the Succession Duty Act, 1853, but under a new succession, the son being the predecessor, and that the rate of duty was to be determined upon that footing.

Attorney-General v. *Cecil* (1870) L. R. 5 Ex. 263 applied.

INFORMATION on behalf of the Crown.

Matilda Assheton-Smith, widow (hereinafter called "the testatrix"), by her will dated November 9, 1858, devised certain properties, from and after the expiration of a term and in the meantime subject thereto and to the trusts thereof, to the use of George Duff, the eldest son of Mary Duff (a niece of the testatrix's late husband), for his life and from and after his death to the use of his first and other sons severally and successively in order of seniority and the heirs male of their bodies respectively and in default of such issue to the use of the next son (living at the date of the said will) and every other son of the said Mary Duff then begotten and to be begotten in the lifetime of the testatrix severally and successively in the order and according to priority of birth for his life from and after the death of each and every of such last mentioned sons of the said Mary Duff with remainders over. The testatrix empowered every tenant for life whether entitled in possession or not to

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appoint to and in favour of any woman whom he should marry a yearly rentcharge not exceeding 1000*l.* to be issuing out of the estates, and she declared that every person who should become entitled as tenant for life or in tail and not already bearing the surname Assheton-Smith should within one year assume and use that name.

The testatrix died on May 18, 1859, without having revoked or (so far as material) altered her will.

George William Duff (called George Duff in the will), the eldest son of the said Mary Duff, duly assumed the name of Assheton-Smith and went into possession of the estates. He died on November 22, 1904, without having had a son. Thereupon his brother Charles, the second son of Mary Duff, became entitled to the estates for his life, and in due course he assumed the name of Assheton-Smith and was thereafter known as Charles Garden Assheton-Smith. He married first, in 1876, the Hon. Maud Frances Vivian, who died on June 16, 1893. The eldest son of that marriage was Robert George Vivian Duff, who attained his majority on November 14, 1897.

The said Charles Garden Assheton-Smith, on September 4, 1902, married the defendant Lady Assheton-Smith (then Sybil Mary Verschoyle), and by a deed poll, dated December 2, 1904, in exercise of the power contained in the testatrix's will, he appointed to his wife, the said defendant, during her life, if she should survive him, a yearly rentcharge of 1000*l.* for her jointure to be issuing out of the said estates.

By an indenture (hereinafter called "the disentailing deed") dated February 24, 1905, and made between Robert George Vivian Duff of the first part, the said Charles Garden Assheton-Smith of the second part, and A. H. Hastie of the third part, the said Charles Garden Assheton-Smith and Robert George Vivian Duff, with the consent of the said Charles Garden Assheton-Smith as protector of the settlement, granted to the said A. H. Hastie and his heirs the estates comprised in the testatrix's will, of which the said Robert George Vivian Duff was then tenant in tail, to hold the same subject to all charges and estates prior to and

powers overreaching the estate in tail male of the said Robert George Vivian Duff (other than the life estate of the said Charles Garden Assheton-Smith) but discharged from all estates in tail male or in tail of the said Robert George Vivian Duff and all estates rights interests and powers to take effect after the determination or in defeasance of such estates tail to such uses as the said Charles Garden Assheton-Smith and Robert George Vivian Duff should jointly appoint.

By an indenture (hereinafter called "the settlement") dated February 24, 1905, and made between the said Charles Garden Assheton-Smith, Robert George Vivian Duff and certain trustees, the said Charles Garden Assheton-Smith and Robert George Vivian Duff in exercise of the powers vested in them by the disentailing deed appointed that all the estates should, subject to existing charges, thenceforth go remain and be (so far as material) to the use of the said Charles Garden Assheton-Smith during his life in restoration and continuation and by way of confirmation of the life estate limited to him by the testatrix's will and from and after his death if the defendant Lady Assheton-Smith should survive him and be his widow then to the use that she should thenceforth during her life receive for her separate use such a yearly rentcharge as with any yearly rentcharge appointed or to be appointed under the provisions contained in the testatrix's will would amount to the sum of 12,000*l.* to be charged upon and issuing out of the premises thereby settled, and subject thereto and to certain other specified uses to the use of the said Robert George Vivian Duff during his life and from and after his death to the use of his first and other sons successively in remainder with an ultimate remainder to him in fee simple.

Charles Garden Assheton-Smith was created a baronet in 1911 and died on September 24, 1914, without having revoked the appointment of a jointure rentcharge of 1000*l.* to the defendant, and leaving his son Sir Robert George Vivian Duff him surviving.

Upon the death of Sir Charles Garden Assheton-Smith

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succession duty under ss. 2 and 10 of the Succession Duty Act, 1853, became payable in respect of the estates settled by the testatrix at the rate of 10 per cent., the said Sir Robert George Vivian Duff being a stranger in blood to the testatrix. Sir Robert, however, died on October 16, 1914, killed in action in France, before the first instalment of succession duty became payable, and, accordingly, under and by virtue of s. 21 of the same Act, no succession duty in fact became payable in respect of the said estates to which he became entitled on the death of his father.

The Information alleged that on the death of Sir Charles Garden Assheton-Smith succession duty became payable in respect of the jointure rentcharges together not exceeding 12,000*l.*, to which the defendant Lady Assheton-Smith then became entitled under and by virtue of the testatrix's will, the deed poll dated December 2, 1904, and the settlement. Such duty, it was alleged, was by virtue of s. 15 of the Succession Duty Act, 1853, payable at the rate of 10 per cent. on the value of those rentcharges, being the rate at which the duty would have been payable by Sir Robert if the rentcharges had not been vested in the defendant. The Inland Revenue Commissioners applied to the defendants for payment of the duty at 10 per cent. on the rentcharges, but as the defendants refused to pay the same and contended that duty was payable on so much of the rentcharges as was not charged by the deed poll of December 2, 1904, at the rate of 1 per cent. only as on a succession derived from the said Sir Robert, the Attorney-General claimed a declaration that duty was payable at the rate of 10 per cent.

By their answer the defendants said that succession duty on the death of Sir Charles Garden Assheton-Smith became payable in respect of so much of the jointure rentcharges (together not exceeding 12,000*l.*) as the defendant Lady Assheton-Smith then became entitled to under and by virtue of the testatrix's will and the deed poll of December 2, 1904, and such duty was payable at the rate of 10 per cent.; but that duty did not become payable under s. 15 of the Succession Duty Act, 1853, at the rate of 10 per cent. or any

other rate in respect of the defendant's jointure rentcharges as she became entitled to under the settlement; that if succession duty became payable under s. 15 in respect of the defendant's jointure rentcharges as she became entitled to under the settlement, it was at the rate at which the duty would have been payable by Sir Robert if the rentcharges had not become vested in the defendant, but inasmuch as Sir Robert died before the first instalment of the duty became payable, then under s. 21 of the Act no duty would have been payable by Sir Robert if the rentcharges had not become vested in the defendant, and accordingly no duty was payable in respect of so much of the jointure rentcharges as the defendant became entitled to as last aforesaid.

Sir Patrick Hastings A.-G. and *Colquhoun Dill* (*Sheldon* with them) for the Crown. The question is, what rate of duty is payable under the Succession Duty Act, 1853 (1), by

(1) Succession Duty Act, 1853, s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or in expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 10: "There shall be levied and paid to [His] Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties. . . . . Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound per centum upon such value. . . . . Where the successor shall be . . . . a stranger in blood to [the predecessor] a duty at the rate of ten pounds per centum upon such value."

Sect. 11: "Where any person chargeable with duty under this Act in respect of any succession . . .. shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor . . . . then the person taking such succession . . . . shall pay in respect thereof the same rate of duty only as such his or her wife or

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Lady Assheton-Smith in respect of her jointure rentcharge? As Sir Robert Duff was the original successor, and, in the natural course, on succeeding to the estates would have had to pay duty at the rate of 10 per cent.—he being a stranger in blood to the testatrix—Lady Assheton-Smith must pay duty at the same rate inasmuch as her jointure rentcharge was carved out of his succession. In *Baron Wolverton* v. *Attorney-General* (1) Lord Herschell said (2): "I am unable to find in the Act any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it"; and in *Duke of Northumberland* v. *Attorney-General* (3), Lord Halsbury said (4): "A succession within the Act once established, no manipulation of the parties afterwards can get rid of it." Reliance will no doubt be placed by the defendants on *Attorney-General* v. *Cecil* (5) as establishing that in the circumstances of the present case the jointure rentcharge had not become vested in the jointress "by alienation or by any title not conferring a new succession" within s. 15 of the Succession Duty Act, 1853, but had become vested in her by a new succession. That case, however, cannot now be considered good law in view of the subsequent decisions in *Baron Wolverton* v. *Attorney-General* (1) and *Duke of Northumberland* v. *Attorney-General* (3); see especially the observations of Lord Herschell in the former of these two cases, where he said (6): "I can see nothing either in the terms of the section [s. 15] or in the reason of the thing to suggest that an alienation by

husband would have been chargeable with if she or he had taken the same."

Sect. 15: ". . . . Where after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created. . . . ."

(1) [1898] A. C. 535.
(2) Ibid. 548.
(3) [1905] A. C. 406.
(4) Ibid. 409.
(5) L. R. 5 Ex. 263.
(6) [1898] A. C. 555.

instrument inter vivos, which merely transferred the interest of the successor or some part of it to some other person, would create a new succession." If *Attorney-General* v. *Cecil* (1) can still be supported, it can only be so on its own facts. There the tenant in tail predeceased the tenant for life, whereas in *Duke of Northumberland* v. *Attorney-General* (2) and in the present case the tenant in tail survived the tenant for life.

[They also cited *Lord Braybrooke* v. *Attorney-General.* (3)]

Manning K.C. and *Gavin Simonds* for the defendants. The interest created in favour of Lady Assheton-Smith was not an "alienation" within s. 15 of the Succession Duty Act, 1853. She acquired her interest by a title conferring a new succession: *Attorney-General* v. *Cecil* (1), and per Romer L.J. in *Attorney-General* v. *Duke of Northumberland.* (4) The case is therefore entirely outside s. 15 and comes within s. 2, and the rate of duty is determined by the relationship between Lady Assheton-Smith, the successor, and Sir Robert Duff, the predecessor. *Attorney-General* v. *Cecil* (1) was approved in *Charlton* v. *Attorney-General* (5), and it was not open to the House of Lords in *Baron Wolverton* v. *Attorney-General* (6) or in *Duke of Northumberland* v. *Attorney-General* (2) to overrule it even if they had desired to do so. In *Baron Wolverton* v. *Attorney-General* (6) Lord Herschell was careful to say that *Attorney-General* v. *Cecil* (1) in no way conflicted with the decision then being given. Even assuming, however, that the Crown's contention is right that this is an "alienation" within s. 15, the duty payable by virtue of that section is that which would have been payable by the alienor, and as in the events that happened no duty became payable by him, Lady Assheton-Smith escapes liability.

[*In re Peyton* (7) was referred to.]

Colquhoun Dill replied.

Cur. adv. vult.

(1) L. R. 5 Ex. 263.
(2) [1905] A. C. 406.
(3) (1861) 9 H. L. C. 150.
(4) [1904] 1 K. B. 762, 780.
(5) (1879) 4 App. Cas. 427, 440.
(6) [1898] A. C. 535.
(7) (1861) 7 H. & N. 265.

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March 10. ROWLATT J. read the following judgment: In this case property stood limited to a father for life with remainder in tail to his son under the will of a stranger in blood. They barred the entail and resettled the estate providing for a jointure to the father's widow on his death. According to well settled principles the jointure is to be regarded as taking effect out of the estate of the son. The father having died, the Crown by this Information claim succession duty at 10 per cent. on the jointure based on the relationship of the son to the testatrix. The claim rests on the contention that within the meaning of the second limb of s. 15 of the Succession Duty Act, 1853, the succession of the son has become vested by alienation in the jointress to the extent of the jointure. Whether that is so is the sole question before me.

The words in the section are, "vested by alienation or by any title not conferring a new succession." It is now finally settled by the decision of the House of Lords in *Duke of Northumberland* v. *Attorney-General* (1) that the words "not conferring a new succession" do not qualify the word "alienation" but only the word "title." The position appears to be as follows: (1.) A simple alienation by way of assignment of the succession does not confer a new succession. In such a case it would not matter whether in the construction of the section the word "alienation" is qualified or not, because the disposition does not raise the question. *Baron Wolverton* v. *Attorney-General* (2) was of that kind. (2.) There may be a disposition taking effect out of the succession which is not an alienation. Such a case is outside the section, not because if it confers a new succession it is taken out of it by any exception, but because it is never within it. That was the position in *Attorney-General* v. *Cecil*. (3) That decision was so explained by Lord Herschell in *Lord Wolverton's Case* (2) and by Romer L.J. in *Attorney-General* v. *Duke of Northumberland*. (4) On that footing it does not conflict with the construction put upon the section in

(1) [1905] A. C. 406.
(2) [1898] A. C. 535.
(3) L. R. 5 Ex. 263.
(4) [1904] 1 K. B. 762, 780.

both these cases and now settled—namely, that the words "not conferring a new succession" do not qualify the word "alienation." But (3.) there may be a case in which there is an "alienation" which does confer a new succession, and in such a case it becomes vital to determine whether the word "alienation" is qualified or not. That was the position in *Duke of Northumberland* v. *Attorney-General* (1), where the point was settled as above mentioned, overruling *In re Cooper and Allen's Contract.* (2) The last mentioned case had previously been questioned by Lord Herschell in *Lord Wolverton's Case* (3) as being "the only case which afforded any support to the idea" (which Lord Herschell was combating) "that a new succession could take the place of an old one."

I have stated the position under the section with the decisions by which it has been developed because it enables me to determine the relation between *Attorney-General* v. *Cecil* (4) and *Duke of Northumberland* v. *Attorney-General* (1), upon which the present case turns. When once it is realized that, as pointed out by Lord Herschell and Romer L.J. in the passages already referred to, the decision in *Attorney-General* v. *Cecil* (4) was that there was no alienation at all, it is apparent that in *Duke of Northumberland* v. *Attorney-General* (1), where the existence of an alienation was not and could not be questioned—for the fee had been conveyed away outright—the former decision did not come under review. If *Attorney-General* v. *Cecil* (4) had proceeded on the ground that there had been an alienation but that it was an alienation conferring a new succession, it would, like *In re Cooper and Allen's Contract* (2), have been a decision in the way of the view taken by the Court of Appeal and the House of Lords, and no doubt would have shared the same fate.

Except in two particulars the present case is identical with *Attorney-General* v. *Cecil.* (4) The first point of difference is that, whereas Lady Assheton-Smith in this case was given

(1) [1905] A. C. 406.
(2) (1876) 4 Ch. D. 802.
(3) [1898] A. C. 535, 551.
(4) L. R. 5 Ex. 263.

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Rowlatt J.

a jointure, Lord Eustace Cecil received a lump sum. I cannot conceive, nor indeed was it suggested, that that affects the question. The second difference is that in *Attorney-General* v. *Cecil* (1) the original successor died before the original tenant for life, whereas in this case the survivor was the original successor. The order of these two deaths having been the same in *Duke of Northumberland* v. *Attorney-General* (2), the Attorney-General suggested that it was on this distinction that s. 15 was held to be applicable in that case though inapplicable in *Attorney-General* v. *Cecil*. (1) I cannot understand how such a consideration could be relevant in either of the cases, though the deaths in the alienee's family in the lifetime of the tenant for life were of course material in *Duke of Northumberland* v. *Attorney-General* (2) not upon the alienation (which was not in question), but as raising the question of the exception. The tenant in tail in remainder can alien the remainder in fee. If he does so, it seems to me it does not matter whether he lives long enough to have come into possession or not. In either case he aliens the estate, though in the latter case he would not have been the poorer in point of income in possession for doing so. With all respect I think the supposed distinction rests upon a confusion between title and possession.

For these reasons I hold that the Information fails and must be dismissed with costs. When and from whom the 10 per cent. duty, which attached to the entirety of the original succession, is or will be payable is not now in question. All I decide is that the jointress is not liable for it in respect of her jointure as alienee.

Information dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Hasties.*

(1) L. R. 5 Ex. 263. (2) [1905] A. C. 406.

J. S. H.

DUFTY *v.* PALMER.

1924
March 12, 13.

Emergency Legislation—Landlord and Tenant—Rent lower than standard Rent—Notice of Increase up to standard Rent—Basis of Increase of Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 1, 2, 3.

Where premises have been let at a rent lower than the standard rent, a landlord cannot, by terminating the tenancy and giving notice of increase, raise the rent to the standard rent. But increases permitted under s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, must be based on the standard rent.

APPEAL from Rotherham County Court.

The appellant, the plaintiff, Mr. E. E. Dufty, was the landlord, and the respondent, the defendant, Mr. J. Palmer, was the tenant of a dwelling house, Glencoe, Station Road, Rotherham. On August 3, 1914, the premises were let at a rent of 68*l.* per annum, which was therefore the standard rent. After remaining vacant for six months the house was let to the defendant in July, 1918, at a rent of 40*l.* per annum. On January 10, 1922, the plaintiff, to comply with s. 3 of the Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), served a notice to quit expiring on July 25, 1922, and at the same time served a notice of increase of rent from the 40*l.* to 60*l.* (which was treated throughout the argument as 68*l.*, the amount of the standard rent). The defendant did not give up possession on July 25, and became a statutory tenant. On September 20, 1922, the plaintiff served a further notice of permitted increases of rent based on the standard rent of 68*l.*, being 40 per cent. of the net rent, under s. 2 of the Act of 1920. The defendant did not pay the rent as increased under either notice, and the plaintiff brought an action in the county court claiming possession on that ground.

The county court judge held that the increase of the rent from 40*l.* to 68*l.* was not a permitted increase within s. 1 of the Act. He offered to give judgment for the plaintiff for 52*l.* 11*s.* 9*d.*, arrears of rent at the rate of 40*l.* per annum, plus a 40 per cent. increase based on that rent. On the

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refusal of the plaintiff to accept this, he gave judgment for the defendant.

The plaintiff appealed.

Mortimer K.C. and *Bramley* for the plaintiff. There is no decision on this point, whether a rent can be increased up to standard rent, though there are obiter dicta dealing with it. McCardie J. in *Glossop* v. *Ashley* said (1): "Now the Acts appear to assume that . . . . a landlord . . . . may at any time raise to a standard rent a rent which previously had been below the standard rent." The case went to the Court of Appeal, and the judges did not agree on the point, Scrutton L.J., as reported in the Law Journal report (2), apparently being of the same opinion as McCardie J., while Atkin L.J. was of the contrary opinion. (3) Bankes L.J. seemed to support the appellant's contention. (4)

Sect. 15, sub-s. 1, of the Act of 1920 supports that contention, for it provides that a statutory tenant shall benefit from and observe all the conditions of the original tenancy "so far as the same are consistent with the provisions of this Act." It is not consistent with those provisions that a tenant should remain on at a rent lower than the standard rent, because the Act always assumes that the rent payable is the standard rent and bases all the increases on that rent.

John Duncan for the defendant. The remarks of Scrutton L.J. in *Glossop* v. *Ashley* (2) were obiter; Atkin L.J. did not agree with them (3), and Bankes L.J. was careful to leave the point open. (5) If the plaintiff is right, a landlord might let a depreciated property on a short tenancy at a low rent, and, immediately on the termination of the tenancy, by giving notice of increase, compel the tenant to pay rent, the standard rent, far higher than the worth of the property. These Acts are rent-restricting not rent-expanding Acts, and should be construed in favour of the tenant. Sect. 15, sub-s. 1, of the Act of 1920, which gives the statutory tenant

(1) [1921] 2 K. B. 451, 458.
(2) (1921) 90 L. J. (K. B.) 1237, 1246.
(3) [1922] 1 K. B. 1, 11.
(4) Ibid. 5.
(5) Ibid. 7.

the benefit of the original terms and conditions of the contract of tenancy, confers on the defendant the benefit of the lower rent stipulated for in that contract, and that stipulation is certainly not inconsistent with the provisions of an Act passed for the protection of tenants.

It is admitted that increases must be based on the standard and not the actual rent.

Mortimer K.C. replied.

HORRIDGE J. The facts of this case were as follows. In August, 1914, the standard rent of these premises was 68*l*. In July, 1918, they were let to the defendant at a rent of 40*l*. a year. In January, 1922, the plaintiff gave the defendant notice to terminate the tenancy on July 25, 1922, or, if the tenancy was not terminated, the tenant was to pay an increased rent of 68*l*. In September, 1922, the plaintiff served on the defendant a notice of the increases in rent permitted by s. 2 of the Increase of Rent, &c. (Restrictions), Act, 1920. This action was brought in the county court to recover possession of the premises, a year and a month's rent at the rate of 68*l*. a year, and the 40 per cent. permitted increase based on the standard rent of 68*l*. The question which this Court has to decide is whether or not, where premises are let at less than the standard rent, the landlord can give notice determining the tenancy and raising the rent so that in the future the tenant will have to pay the standard rent. The question is one of considerable difficulty, and to determine it we must consider first the Act of Parliament, and then certain obiter dicta in various judgments, one of which was delivered by a Court of first instance and the others by members of the Court of Appeal in the same case.

Is there anything in the Act of 1920 which authorizes the increase of an agreed rent to a higher, standard rent? It is an Act for the restriction of rent; it is not an Act to increase rents which have been agreed between the parties. I can imagine cases of very considerable hardship if persons who have agreed to pay a certain rent and have taken possession and have expended money or established businesses

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on the premises can afterwards be given notice to quit and to pay the considerably higher figure of the standard rent. It is quite true that before the Act was passed that could be done, but I think that the object of the Act was to give to the tenant fixity of tenure, and that it would not be within the purview of the Act that it should be used to destroy fixity of tenure unless the tenant agreed to pay an increased rent.

Sect. 1 of the Act prohibits the recovery of any rent which exceeds the standard rent except where such increased rent is permitted by other provisions of the Act. The only provision of the Act with regard to increases in rent is s. 2. That section specifies certain permitted increases, including two increases with which we are concerned in the present case and which amount together to 40 per cent. of the standard rent. There is no express provision in the Act that a landlord is entitled to increase an agreed rent to the standard rent if the latter is higher. To my mind s. 15 points strongly in the opposite direction. It provides that a statutory tenant shall be entitled to the benefit of all the terms and conditions of the original contract of tenancy so far as the same are consistent with the provisions of the Act. One of the terms and conditions of the original contract of tenancy in this case was that the tenant should pay a rent of 40*l.*, and I can see nothing in the Act to show that it is inconsistent with the provisions of the Act to allow a tenant to remain in the premises at that rent and not at the standard rent. There being nothing in the Act to justify the increase from the agreed rent to the standard rent, there is nothing to authorize any interference with the bargain which was made between the parties for the lower rent.

Turning to the authorities on this matter, I will consider the language of the judges to see on what basis they put the views which they expressed. In *Glossop* v. *Ashley* (1) there was, on the coming into operation of the Increase of Rent, &c. (Restrictions), Act, 1920, a head rent of 130*l.* and an occupation rent of 24*l.*, and the question for the decision of the

(1) [1921] 2 K. B. 451.

Court was whether the standard rent was to be taken to be 130*l.* or 24*l.* McCardie J. decided (and his decision was affirmed by the Court of Appeal) that the standard rent was 24*l.* and not 130*l.* In the course of the case it appeared that the actual rent which the tenant was paying was 30*l.*, and that a notice had been served on him to quit or to pay a rent of 130*l.* Although the only thing which it was necessary to decide there was the figure of the standard rent the learned judge dealt with the question which arises in the present matter—namely, whether, if the standard rent had been 130*l.*, the landlord by giving notice could have raised the agreed rent of 30*l.* to that standard rent. He considered whether the fact that the tenant remains on after having received from the landlord notice of the latter's intention to raise the rent entitles the Court to draw the inference that a new agreement has been come to by the parties. In the course of his judgment McCardie J. says (1): "It is argued that here the tenant assented to the increased rent of 130*l.* by remaining in possession after the notice by the landlord. I am unable to agree with this argument." He goes on to quote the authorities and to repeat that the tenant "never agreed that the rent should be increased to 130*l.*" Then he deals with the question which is raised in the present case (2): "The question arises," he says, "whether the plaintiffs' notice of March 23, 1920 [i.e., to increase the rent from the agreed rent to the standard rent], operates to secure them the increased rent apart from any assent by the tenant. Neither the Act of 1915 (see s. 1) nor the Act of 1920 (see s. 2) appear to deal with such a case as that before me. The actually contemplated increases seem to be confined to such matters as expenditure on or improvement of the house, or an increase of rates, or fixed percentage rent increase." He continues: "But as Bankes L.J. said in *Remon's Case* (3): 'The Court must endeavour to place a reasonable interpretation upon the statute, if the language used admits of such an interpretation.' Now the Acts appear

(1) [1921] 2 K. B. 451, 457. (2) [1921] 2 K. B 458.
(3) [1921] 1 K. B. 49, 55.

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to assume that although a landlord cannot raise the rent of a house above the standard rent, plus the permitted increases, yet he may at any time raise to a standard rent a rent which previously had been below the standard rent." With great respect I cannot extract from the language of the Acts any such assumption. "Save as forbidden by the Act," continues McCardie J., "the ordinary powers of a landlord appear to remain." "If therefore a landlord after due notice of claim and after the expiration of the common law tenancy demands the standard rent from the statutory tenant, then I think that the tenant must be held liable in law to the higher rent. I see no other way of reconciling the statutory provisions with common law obligations." It is true that that is the only way of effecting that reconciliation if you begin by assuming that an agreed rent can always be increased to a higher standard rent on the termination of the tenancy. "The clauses relating to the form of notice with respect to the permitted increases, as, for example, for increased rates, do not appear to deal with such a case as that before me." I agree that they do not.

The case went to the Court of Appeal (1), and it is said that the judgment of Bankes L.J. agrees with that of McCardie J. on this point. I do not think, however, that the language of Bankes L.J. comes to anything like approval of McCardie J.'s words. Just before McCardie J. dealt with the question of increasing the agreed rent to the standard rent he dealt fully with the liability of a statutory tenant to pay the permitted increases even though he did not assent to them, and I think that the language of Bankes L.J. must be taken to apply to that portion of his judgment. He says (2): "Secondly the learned judge held that where a landlord seeks to increase the rent by an amount allowed by the Act, and gives notice to the tenant that if he continues in possession he must pay at the increased rate, the tenant who holds over as a statutory tenant must pay the permissible increase." Those words seem to me clearly to point to the fact that Bankes L.J. was referring to the increase permitted by s. 2 of the Act of 1920: "A tenant who is taking up the

(1) [1922] 1 K. B. 1. (2) [1922] 1 K. B. 5.

position of a statutory tenant must accept the statutory obligations; whether in point of fact he assents to or dissents from the landlord's demand is immaterial; if he remains in occupation he remains upon the terms which the statute enables the landlord to impose." The statute does not enable a landlord to impose increases of rent not authorized by s. 2. "This expression of opinion was not necessary to the decision of the case, but the learned judge decided it and I think he decided it rightly." If I had any doubt whether Bankes L.J. intended to decide the question which we have to decide to-day, the closing portion of his judgment makes it clear that he did not so intend. It is as follows (1): "The question whether the Act of 1920 permits any increase other than those specified in the first schedule, in a case where the agreed rent is less than the standard rent, may have to be decided at some future time." Scrutton L.J., in the report in the Law Reports, does not, in my view, deal with the matter. We have been referred to the report of his judgment in the Law Journal Reports, where he appears to deal with this particular point, because he says (2): "If the standard rent had been 130*l.*, I should not have seen any difficulty in the plaintiff's recovering this amount against the tenant, not that he agrees to pay it by merely staying in, but I think that, on the result of the statute, if he stays in he would have to pay the standard rent if proper notice was given." That means that if the statutory rent had been greater than the agreed rent he sees no difficulty in the landlord's recovering it. Scrutton L.J. gives no reason why he thinks that that is the effect of the statute; nevertheless, great respect must be paid to that obiter dictum, and this Court might have felt itself bound to follow it if that passage had not disagreed with the judgment of Atkin L.J., who says (3): "It is unnecessary to decide the question whether a landlord can increase the actual rent up to the standard rent apart from the statutory provisions permitting an increase. . . . . It is difficult to find any statutory right to

(1) [1922] 1 K. B. 1, 7. (2) 90 L. J. (K. B.) 1237, 1246.
(3) [1922] 1 K. B. 1, 10.

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increase the rent from the actual rent to the standard rent. This may have an important bearing upon the question whether a mere notice is enough to impose on the tenant an obligation to pay the full standard rent. If the landlord has a statutory right to increase the rent and is acting within that right then a mere notice would be enough; the tenant would have no right to remain unless he paid the rent demanded, and if he did remain his landlord would have a basis on which he could exact the rent. But if he has no such basis then I agree for the reasons given by McCardie J. that a mere notice would not be enough. If the landlord has merely a right at common law to increase the rent he must show that his tenant assents to the increase. The mere fact that the tenant remains in possession after the notice, when he has the option of remaining either as statutory tenant under the Act or as a tenant at an increased rent, is no evidence of an agreement to pay the increased rent. For my part I am not prepared to assent to the proposition that a landlord has the right to increase the rent up to the standard rent." The obiter dictum of Scrutton L.J. is, therefore, in direct conflict with that of Atkin L.J.

In these circumstances I am driven to consider what is my own view of the Act. It is that there is nothing in it from which one can gather any intention that a rent agreed upon by the parties can be increased to the standard rent if it is higher than the agreed rent. All that the plaintiff in this case can recover, therefore, is one year and one month's rent at the rate of 40*l.* a year. Besides this he had given notice of the increases permitted by s. 2 of the Act, and Mr. Duncan for the defendant does not dispute that these permitted increases, if recoverable at all, must be calculated on the standard rent. He is entitled under the first head to 43*l.* 6*s.* 8*d.*, and under the second head to 22*l.* 13*s.* 4*d.*—66*l.* in all.

SANKEY J. I agree. Two questions arise in this appeal. Is the plaintiff entitled to recover a rent of 68*l.* a year, and is the plaintiff, in addition, entitled to permitted increases of

rent based on that rent of 68*l.* a year? The defendant made no express agreement to pay 68*l.* a year instead of 40*l.*, but it is said that, by reason of the Increase of Rent, &c. (Restrictions), Act, 1920, and of the plaintiff's giving notice to quit and notice of increase of rent, and by reason of the fact that the defendant stayed at the premises after he had received such notices, the defendant is liable to pay both the increase from 40*l.* to 68*l.* and also the permitted increase on 68*l.*

Was the defendant bound to pay rent at the rate of 68*l.* a year? That depends on the scope of the Act. In the main it is a restricting and not an enabling statute and prohibits the increasing of rent. It is divided into parts. The first part is headed: "Restrictions on Increase of Rent and Mortgage Interest." The next part is headed: "Further Restrictions and Obligations on Landlords and Mortgagees." Some general sections on the application and interpretation of the Act follow, and by s. 19, sub-s. 1, it is provided that: "This Act may be cited as the Increase of Rent and Mortgage Interest (*Restrictions*) Act, 1920." Therefore I say that the general scope of the Act is to restrict increases of rents and not to enable increases to be made. It appears to me to crystallize the rents of the class of property to which it applies, and to direct that a house in that class shall have a standard rent, more than which the landlord shall not be entitled to recover, and then to make an exception to the general rule thus laid down. By s. 2 it provides that certain increases may be recovered by the landlord. The sidenote to that section is the key to the section; it is: "Permitted increases in rent." The increases in rent permitted by s. 2 all refer to increases over and above the standard rent, and do not refer specifically to any increase of an agreed rent to a standard rent. Nowhere in the Act is there any provision which expressly enables a landlord who has agreed to a rent lower than the standard rent to increase that rent to the standard rent. Not only is there nothing in the Act expressly giving the landlord that power, but the form of notice of increase of rent in the first Schedule to the Act

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provides for the permitted increases, but in no way provides for increasing an agreed rent which is lower than the standard rent to the level of the standard rent. In my opinion, therefore, the landlord cannot avail himself of the Act to give notices to quit and of increase of rent and so convert an agreed rent into the standard rent.

It is, however, said that this matter has been discussed in *Glossop* v. *Ashley*. (1) I agree, but in my view the point now raised before us was not before the Court for consideration in that case. I think that Atkin L.J. expressed the opinion to which I have given utterance (2), and I think it is possible, to judge from one of the reports (3), that Scrutton L.J. took an opposite view. Bankes L.J. said (4) that the point remained open for decision. This Court is, therefore, free to express its own view and I have expressed mine.

With regard to the permitted increases it is not disputed that they must be based on the 68*l*. rent. Mr. Duncan for the defendant contended that the notice was not a valid one, but as the point was not taken in the Court below it cannot be taken here. I therefore agree that the defendant is entitled to pay a rent of 40*l*. a year, but that the permitted increases must be calculated on the standard rent of 68*l*. The result is that the plaintiff is entitled to judgment.

Judgment accordingly.

Solicitors for plaintiff: *George A. Herbert, for Joseph A. Atkinson, Leeds.*

Solicitors for defendant: *Bono & Nimmo.*

(1) [1921] 2 K. B. 451; [1922] 1 K. B. 1.

(2) [1922] 1 K. B. 1, 10.

(3) 90 L. J. (K. B.) 1237, 1246.

(4) [1922] 1 K. B. 1, 7.

W. L. L. B.

PHIPPS AND COMPANY (NORTHAMPTON AND TOWCESTER BREWERIES), LIMITED *v.* ROGERS.

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March 17, 19, 24.

[1924. P. 23.]

Landlord and Tenant—Licensed Premises—Determination of Tenancy—Notice to quit—Validity—"Months"—Lunar or Calendar.

Although a notice to quit need not actually name the date when possession will be demanded or given, it must indicate it with reasonable clearness, so that the party to whom the notice is given may know what is required of him. Further, the notice must be given for the proper time, as provided by the lease or tenancy agreement.

The tenancy of an hotel was determinable by a three months' notice to quit, to expire "on any one of the days appointed as special transfer sessions by the justices .... after the expiration of six months from the date when the licence was or is transferred to the tenant." The landlords gave a notice to the tenant to quit the premises "on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof":—

Held, that as the notice to quit did not state the date when possession was required or indicate it with reasonable clearness so that the tenant could know definitely when he had to vacate the premises, it was not a good notice.

May v. *Borup* [1915] 1 K. B. 830 distinguished.

Although the word "months" in legal documents, which are not business documents, prima facie means lunar months, the context, or the circumstances, may show that the parties mean calendar months. Slight evidence is sufficient to show this.

Semble, the lease of an hotel or a public-house is a business document, and the word "months" used therein means calendar months.

Bruner v. *Moore* [1904] 1 Ch. 305 considered.

ACTION tried by Lush J.

The plaintiffs, who were brewers, by their writ dated February 8, 1924, claimed to recover from the defendant possession of the Abington Park Hotel, Northampton, the plaintiffs alleging that the defendant's tenancy had been duly determined by notice to quit expiring on January 8, 1924.

The following statement of facts is, in substance, taken from the judgment: The premises were let to the defendant under an agreement dated May 29, 1908, on a tenancy from year to year from May 25 at a rent of 200*l.* a year, payable quarterly. The tenancy was determinable by a three months' notice to quit, to be given by either party, to expire "on any one of the days appointed as special transfer sessions by

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the justices for the district in which the premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant." The defendant agreed to buy his supplies from the plaintiffs. The defendant also undertook " to assign or transfer the residue of his licence to the landlords or their nominee and to attend when required so to do by the landlords before the justices to sign all necessary notices and to do all other acts and things which may be required at the end of the tenancy to transfer the said licence to the landlords or their nominee."

On October 12, 1923, the plaintiffs gave the defendant a notice to quit and deliver up the premises " on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof."

The practice with regard to the transfer of licences was as follows: The justices at their annual general meeting in February fix a certain number of special transfer sessions for the ensuing year; and in October, 1923, when the notice to quit was given, the remaining date for the holding of special transfer sessions fixed in February, 1923, was January 8, 1924. At the annual meeting on February 7, 1924, fresh dates were fixed, the first of these being April 8, 1924. If the expression " three months' notice " in the agreement meant three lunar months the date on which the notice to quit would expire would be January 8, 1924; if calendar months were meant the first date on which a transfer could be effected was February 7, 1924; but if the words " special transfer sessions " did not include the annual general meeting, the notice to quit would expire on April 8, 1924. It appeared in evidence that a difference of opinion existed on the question whether the annual general meeting could rightly be regarded as a special transfer sessions, but the judge did not consider that a notice to quit under the tenancy could be given for any other than the special transfer sessions fixed at the annual general meeting.

Ever since 1913 the plaintiffs had in their tenancy agreements defined " months " as meaning calendar months. The judge drew the conclusion of fact from the evidence

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that they did this by way of clearing up any doubts that had existed as to what was intended rather than as an alteration of their practice, and in the judge's opinion they acted on the view that all their tenants were entitled to three calendar months' notice. In his view they never intended to take possession of the defendant's hotel on January 8, which they would have had to do if their notice was a three lunar months' notice. They did not demand possession on that date nor did they prepare any notices or transfers for the defendant to sign on that date or require him to attend before the justices. The defendant ordered his weekly supplies of beer for two weeks after January 8, and the plaintiffs supplied him without suggesting that he had ceased to be their tenant. On January 21 the plaintiffs asked the defendant to sign transfers for February 7, the date of the annual meeting. The defendant refused to do so, not being, as he contended, under that obligation. The plaintiffs' solicitors then saw the defendant's solicitors and said they should issue a writ when the notice to quit had expired. When the defendant ordered a supply for some weeks early in February the plaintiffs replied that in supplying what was required they must not be taken to be recognizing the tenancy and that they were about to issue a writ for possession. They shortly afterwards issued it, claiming that the notice to quit had expired not on February 7 but on January 8, the "months" referred to in the agreement of tenancy being treated by them as lunar months.

The defendant by his affidavit contended that the notice to quit was too vague, and was consequently invalid.

Sandlands for the plaintiffs. The notice to quit was a good and valid notice: *May* v. *Borup* (1); and it expired on January 8, 1924, the date of the special transfer sessions first occurring after three lunar months' notice. Lunar, and not calendar, months are, in the absence of special provision to the contrary, meant in an agreement of tenancy, such a document not being a commercial document.

Morle for the defendant. The notice to quit was invalid

(1) [1915] 1 K. B. 830.

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as being too vague. The defendant could not, by referring to his agreement, know on what date the notice would expire; it was therefore incumbent on the plaintiffs to specify which special transfer sessions they intended the notice to refer to. *May* v. *Borup* (1) is distinguishable inasmuch as the landlord could, by reading the notice to quit in conjunction with the tenancy agreement, tell when the notice would expire. Further, the word "months" in this agreement means calendar months, and therefore the notice to quit had not expired by January 8, 1924. *Bruner* v. *Moore* (2) is no doubt against this view, but the opinion expressed by Farwell J. in that case, that there is no general exception that "month" means calendar month in business documents, is against the weight of authority, and in particular against the clearly expressed view of Pollock C.B. in *Hart* v. *Middleton*. (3) This is a business document, and, moreover, the intention of the parties obviously was to treat "months" as meaning calendar months. Certainly on the evidence neither party treated the notice to quit as a notice of three lunar months.

Sandlands in reply. The notice to quit was good. In *Doe* v. *Butler* (4) a notice requiring a tenant to quit "at the end and expiration of the current year of your tenancy thereof, which shall expire next after the end of one half year from the date thereof," was held a good notice. So, too, in *Hirst* v. *Horn* (5) a notice to quit for a given date "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," was held good, Lord Abinger C.B. saying that "we must suppose the tenant knew the time of its expiration as well as the landlord." The same thing can be said of the present defendant. Nothing might seem more vague than the terms of the notice in *May* v. *Borup* (1)—the notice stating that the tenant meant to quit "at the earliest possible moment"—but it was held to be good. The notice in this case expired at the end of three lunar months and no subsequent conduct

(1) [1915] 1 K. B. 830.
(2) [1904] 1 Ch. 305.
(3) (1845) 2 C. & K. 9.
(4) (1797) 2 Esp. 589.
(5) (1840) 6 M. & W. 393, 395.

of the parties can affect the position: *Johnstone* v. *Hudlestone* (1); *Bessell* v. *Landsberg* (2); *Lewis* v. *Nicholson* (3); *North Eastern Ry. Co.* v. *Lord Hastings*. (4) It is clear from a long line of authorities that where a tenancy is determinable upon so many months' notice the word "months" means, prima facie, lunar months: *Rogers* v. *Kingston-upon-Hull Dock Co.* (5); *Helsham-Jones* v. *Hennen & Co.* (6); *Schiller* v. *Petersen & Co.* (7) Here there is nothing in the agreement or in the circumstances to prevent the application of this general rule.

[*Soames* v. *Nicholson* (8) was also referred to.]

Cur. adv. vult.

March 24. LUSH J. read the following judgment: The question I have to decide in this case, which has been very well argued, is whether a notice to quit was a good and valid notice, and, if it was, whether it expired on the date alleged by the plaintiff and before writ. [His Lordship stated the facts and continued:] The first question is, is the notice to quit a good and valid notice? I am of opinion that it is not. A notice to quit, though it need not actually name the date, must indicate with reasonable clearness when possession will be demanded or given, so that the other party may know what is required of him, and the time must be the proper time as provided by the lease. If it is so worded as to mislead the other party or leave him in complete doubt as to when possession must be given, or if it is for a wrong date, it is a bad notice. A properly-drawn notice to quit always provides, if there is any question as to the right date, an alternative date, such as this "or at the expiration of the current year of your tenancy which shall expire next after the expiration of half a year (or whatever the period may be) from the date of this notice." But it indicates the date which is said by the party who gives the notice to be the right one,

(1) (1825) 4 B. & C. 922.
(2) (1845) 7 Q. B. 638.
(3) (1852) 18 Q. B. 503.
(4) [1900] A. C. 260, 263.
(5) (1864) 34 L. J. (Ch.) 165.
(6) (1914) 84 L. J. (Ch.) 569.
(7) [1924] 1 Ch. 394.
(8) [1902] 1 K. B. 157.

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so that the party receiving it knows what is demanded of him and can always comply with the notice without difficulty. The notice to quit in this case gives no date. It does not indicate it with any reasonable clearness. It leaves the date in complete obscurity. It would be impossible for the tenant who received such a notice as this to be sure when he had to vacate the premises. If he took advice it could not be certainly right. The landlords, on the other hand, could adapt the date on which they demanded possession to the circumstances as these best suited them, and contend that it meant this or that, according to those circumstances. A notice to quit which is subject to those uncertainties is in my opinion bad in law. I ought perhaps to refer to *May* v. *Borup* (1), on which Mr. Sandlands relied. The Divisional Court there held that a notice to quit by a tenant that he would go out "at the earliest possible moment" was good. But there the landlord could see quite clearly when the earliest possible moment was—namely, six months from the following March 1. That is quite a different case, as the date there was indicated by the tenancy agreement read in connection with the notice to quit.

Although it is perhaps unnecessary, I will state my views as to the other question that was raised. I think that the notice to quit did not expire in fact on January 8, and that if it were a good notice it would expire on April 8, so that the writ has been issued too soon. "Months," no doubt, in legal documents, which are not business or commercial documents, prima facie are lunar months. But even there the context may show that the parties meant calendar months, or the circumstances, i.e. the circumstances existing at the time the agreement was made, may show it: *Bruner* v. *Moore*. (2) Slight evidence is, in my opinion, sufficient to show that the parties to an agreement when they speak of so many months mean what the word now means in every Act of Parliament—namely, calendar months. I think that the context shows that calendar months were intended in this lease. The rent was payable quarterly, the tenancy could only be determined

(1) [1915] 1 K. B. 830. (2) [1904] 1 Ch. 305.

after the expiration of six months from the date when the licence was transferred, and three months' notice had to be given. I think that the true inference is that the parties were referring to periods of six calendar months and three calendar months, and not to so many weeks. The Court of Appeal drew that inference in the case of a mortgage in *Schiller* v. *Petersen & Co.* (1) But the Court there also held that apart from the particular context the word "months" in a mortgage deed means calendar months. It is a business document. So is the lease of a public-house. Farwell J. expressed a different view as to business or commercial documents in *Bruner* v. *Moore* (2), but the clear decision to the contrary by Pollock C.B. in *Hart* v. *Middleton* (3) was not referred to by the learned judge. The Court in *Soames* v. *Nicholson* (4) treated a provision for three months' notice in the lease of a public-house as meaning three calendar months, and the Court in *May* v. *Borup* (5) similarly dealt with the matter where the lease was of a studio. In my opinion the tenancy agreement in this case provided for a three calendar months' notice.

I have great doubt whether it is open to the plaintiffs in any case to set up that their notice to quit expired on January 8, after they had really given it for another later date and never demanded possession on January 8, and continued to recognize the defendant as their tenant afterwards. It seems to me a little like playing fast and loose with the tenant. But it is unnecessary to decide this.

For the reasons I have stated I think that the claim for possession fails, and I give judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiffs : *Sharpe, Pritchard & Co., for Becke, Green & Stops, Northampton.*

Solicitors for defendant : *James, Mellor & Coleman, for Phipps & Troup, Northampton.*

(1) [1924] 1 Ch. 394.
(2) [1904] 1 Ch. 305.
(3) 2 C. & K. 9.
(4) [1902] 1 K. B. 157.
(5) [1915] 1 K. B. 830.

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March 17, 18; *April* 4.

[IN THE COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* GEORGE BURRELL.

SAME v. WILLIAM BURRELL.

Revenue — Income Tax — Super Tax — Shareholder in Company — Winding Up — Distribution of undivided Profits — "Income" — Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 1.

On the winding up of a limited company the undivided profits of past years and of the year in which the winding up occurred were distributed among the shareholders, of whom the respondent was one:—

Held, that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only.

Dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* [1920] 2 K. B. 657, 675 approved and followed.

Decision of Rowlatt J. [1923] 2 K. B. 478 affirmed.

APPEALS from two decisions of Rowlatt J. on cases stated under the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, and the Taxes Management Act, 1880, s. 57, by the Commissioners for the Special Purposes of the Income Tax Acts.

The appeals were brought by George Burrell and William Burrell respectively against assessments made upon them to super tax. The facts in the two cases were identical, except that the amounts of the assessments and the sums on which they were calculated were different. William Burrell's case in the Court below is reported in [1923] 2 K. B. 478. On appeal George Burrell's case alone was argued, but it was agreed that the decision in that case should govern the appeal in William Burrell's case.

The facts in George Burrell's case as appearing from the case stated were as follows:—

At a meeting of the Commissioners held on July 26, 1920, the respondent George Burrell appealed against additional assessments to super tax in the sums of 5954*l.*, 85,520*l.* and 313*l.* for the years ending April 5, 1917, 1918, and 1919, respectively made upon him under the provisions of the

Finance (1909–10) Act, 1910, and subsequent enactments. These additional assessments were made in respect of part of the sums distributed on liquidation by the twenty-three steamship companies hereinafter referred to and received by the respondent and his wife respectively.

The firm of Burrell & Son, of which the respondent was a partner, held shares, but not a controlling interest, in twenty-three companies, each of which was formed for the purpose of owning one particular ship. Mrs. Burrell, the wife of the respondent, also held shares in most of these companies in her own right.

Each of the companies had gone into liquidation in conformity with its articles of association when the ship which it owned was sold or lost. After any liabilities had been discharged, the assets of the company, including the profits earned from the commencement of the company's year up to the date of the cessation of business, and also any undistributed profits of past years that has been accumulated and invested and held as reserve funds, were distributed among the shareholders, and each shareholder accordingly received in the liquidation a certain fraction of the profits of the year in which business ceased, but which the company had not resolved to divide, and of the accumulated profits of past years invested and then held in reserve.

The facts in the case of each of the twenty-three companies were very similar, and those in the case of the Strathleven Steamship Co., Ld., were taken as typical of the other companies.

This company was incorporated in the year 1906 with a capital of 24,000*l.* in 240 shares of 100*l.* each, and owned, and could only own, one ship. On September 7, 1915, a special resolution was passed by the company in conformity with art. 14 of its articles of association and confirmed on September 22, which was in the following terms: "That out of the accumulated profits of the company a sum of 83*l.* per share be paid off by way of reduction of capital pursuant to s. 40 of the Companies (Consolidation) Act, 1908."

Following upon the special resolution a memorandum was

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produced and registered with the Registrar of Companies under s. 40, sub-s. 2, of that Act, and the company thereupon returned out of accumulated profits 83*l.* in respect of each 100*l.* in reduction of the paid-up capital, leaving 17*l.* per share paid up and the unpaid capital increased by an amount equal to the amount returned. The total amount of capital so returned and liable to recall was 19,920*l.* The company's paid-up capital was thereafter shown in the balance sheet as 4080*l.*, and a special reserve of 19,920*l.*, being the capital liable to recall, also appeared in the balance sheet as a transfer from profit and loss account to special reserve account as a balancing entry. The 19,920*l.* capital returned to shareholders was never recalled to any extent.

The ship was sold to the Australian Government on July 8, 1916, for the sum of 141,705*l.* 14*s.* 8*d.* (less commissions), being a sum in excess of the book value of the steamer as appearing in the company's balance sheet, and the company thereupon went into voluntary liquidation by resolution in terms of art. 98 of its articles of association.

The company's assets in due course were distributed in cash amongst its shareholders. The total amount distributed in the liquidation was 152,909*l.* 3*s.* 10*d.*, the details whereof appeared in the liquidation account. Of this sum 140,941*l.* 3*s.* 9*d.* represented the balance of the purchase money received on the sale of the steamer (less commissions thereon) after payment of the liquidator's fee (amounting to 764*l.* 10*s.* 11*d.*), and 11,968*l.* 0*s.* 1*d.* represented current and accumulated profits made up as follows :—

	£	*s.*	*d.*	£	*s.*	*d.*
Balance of accumulated profits and interest on investments of past years, part of which were cash and the remainder invested and standing in "reserve" ..	4,272	11	8			
Trading profit of current year (*less* Audit Fees)	8,842	2	7			
Interest on investments and deposit receipts for current year	582	16	1			
				13,697	10	4

	£	s.	d.
Brought forward	13,697	10	4
Less Audit Fees (final accounts), Income Tax on final accounts, Staff Bonus, printing and sundry charges	1,729	10	3
	£11,968	0	1

The sum of 11,968*l.* 0*s.* 1*d.* added to the sum of 19,920*l.*, being the amount of the said special reserve hereinbefore referred to, made together the total sum of 31,888*l.* 0*s.* 1*d.*

Between the years 1915 and 1916 twenty-two out of the twenty-three steamship companies returned to their shareholders in reduction of paid-up capital out of accumulated profits sums amounting to 337,012*l.* 10*s.* Twenty-one out of the twenty-two which so returned capital showed thereafter in their balance sheets by transfer from profit and loss account to special reserve account special reserves of amounts equivalent to the amounts of capital so returned. The total amount of such special reserves was 327,812*l.* 10*s.* The total amount of current and accumulated profits distributed by all the companies in their liquidation was 277,155*l.* 14*s.* 5*d.* These two sums of 327,812*l.* 10*s.* and 277,155*l.* 14*s.* 5*d.* respectively added together made a total sum of 604,968*l.* 4*s.* 5*d.*

To the sum of 327,812*l.* 10*s.* (amount of special reserves) there had been added in respect of income tax the sum of 39,719*l.* 7*s.* 11*d.*, making a total sum of 367,531*l.* 17*s.* 11*d.*

To the sum of 277,155*l.* 14*s.* 5*d.* (amount of current and accumulated profits) there had been added in respect of income tax the sum of 59,750*l.* 18*s.* 7*d.*, making a total sum of 336,906*l.* 13*s.*

The two sums of 39,719*l.* 17*s.* 11*d.* and 59,750*l.* 18*s.* 7*d.* added for income tax as aforesaid made together a total sum of 99,470*l.* 6*s.* 6*d.*

The two sums of 367*l.* 17*s.* 11*d.* (gross amount of special reserves after addition of income tax) and 336,906*l.* 13*s.* (gross amount of current and accumulated profits after

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addition of income tax) make together a total sum of 704,438*l.* 10*s.* 11*d.*

The proportions of the sum of 704,438*l.* 10*s.* 11*d.* receivable by the respondent and his wife in the years ended April 5, 1916, 1917 and 1918, according to their respective shares of capital, were 5818*l.*, 85,520*l.* and 313*l.* respectively.

It was contended on behalf of the respondent: (1.) that it was the property of the company which the liquidator distributed among the shareholders, that such property did not include payments made by the companies to shareholders in reduction of paid-up capital under s. 40 of the Companies (Consolidation) Act, 1908, and never recalled, and that no distinction ought to be drawn or was drawn in practice by liquidators between one portion of the distribution and another; (2.) that the liquidator had no power to distribute any portion of the assets as income; (3.) that the case was completely governed by the dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (1), in which he dealt exactly with the present case; (4.) that decisions of the Courts as to the proper method of distribution between different classes of shareholders of a company in liquidation were not relevant to this case; and (5.) that no part of the distribution in the liquidation of the companies could be regarded as income in estimating the respondent's income for super tax purposes.

It was contended on behalf of the Crown (inter alia): (1.) that undistributed profits retained their character as profits in the liquidation of the company and went as profits unless validly capitalized before the liquidation of the company; (2.) that in *In re Bridgewater Navigation Co.* (2); *Bishop* v. *Smyrna and Cassaba Ry. Co.* (3); and *In re W. J. Hall & Co.* (4), the Court held that accumulated profits remained the profits of the persons to whom they belonged, and were so distributable and were not merged in the other assets of the company; (3.) that the remarks quoted from the judgment of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (1) were obiter dicta; (4.) that so much

(1) [1920] 2 K. B. 657, 675.
(2) [1891] 2 Ch. 317.
(3) [1895] 2 Ch. 265.
(4) [1909] 1 Ch. 521.

of the distribution of the companies as represented undistributed profits was income for super tax purposes; and (5.) that the special reserves in question were formed by the transfer of profits from profit and loss accounts to special reserve accounts, as appeared from the balance sheets of the companies, and that such special reserves fell to be distributed as profits in liquidation.

[In the course of the argument reference was also made to *Bouch* v. *Sproule* (1); *In re Crichton's Oil Co.* (2); *In re Armitage* (3); *Birch* v. *Cropper*. (4)]

The Commissioners having taken time to consider their determination, came to the conclusion that the passage cited from the judgment of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (5) governed this case, and that they were bound by it. They held therefore that that portion of the assets which represented undivided profits did not form part of the income of the recipient for super tax purposes when distributed to the shareholders by the liquidator on the liquidation of the company. The respondent was therefore entitled to succeed in the appeals, and they adjusted or discharged the assessments accordingly.

The point of law for the decision of the Court was whether that portion of the assets of a company which represented undistributed profits formed part of the income of the recipient for super tax purposes, when distributed to the shareholders by the liquidator on the liquidation of the company.

Rowlatt J. held that super tax was not payable on the undivided profits as income, on the ground that in the winding up they had ceased to be profits and were assets. He accordingly affirmed the decision of the Commissioners.

The Crown appealed. The appeal was heard on March 17, 18, 1924.

Sir Patrick Hastings A.-G., *A. C. Clauson K.C.* and *R. P. Hills* for the Crown.

(1) (1887) 12 App. Cas. 385.
(2) [1902] 2 Ch. 86.
(3) [1893] 3 Ch. 337.
(4) (1889) 14 App. Cas. 525.
(5) [1920] 2 K. B. 657, 675.

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Sir John Simon K.C. and *A. M. Latter K.C.* for the respondent.

The arguments were substantially the same as those used in the Court below, and sufficiently appear from the judgments.

[Reference was made in the course of the arguments to the following cases and Acts: *In re Bridgewater Navigation Co.* (1); *In re Spanish Prospecting Co.* (2); *Inland Revenue Commissioners* v. *Blott* (3); *In re Armitage* (4); *Bouch* v. *Sproule* (5); *Attorney-General* v. *Ashton Gas Co.* (6); *Bradbury* v. *English Sewing Cotton Co.* (7); *Brooks* v. *Inland Revenue Commissioners* (8); *Birch* v. *Cropper* (9); *Barnardo's Homes* v. *Special Income Tax Commissioners* (10); *In re Crichton's Oil Co.* (11); *In re Odessa Waterworks Co.* (12); *Pool* v. *Guardian Investment Trust Co.* (13); *Ryall* v. *Hoare* (14); Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 40, 54, 163, 164, 198; Finance (1909–10), Act, 1910, ss. 66, 68.

Cur. adv. vult.

In the case of William Burrell the appeal was against additional assessments to super tax in the sums of 7681*l.*, 113,684*l.* and 401*l.* for the same years ending April 5, 1917, 1918 and 1919, respectively made in respect of part of the sums distributed on liquidation by the same twenty-three steamship companies and received by him and his wife respectively.

April 4. The following judgments were delivered:—

POLLOCK M.R. These two cases were admitted to be, if not identical in their facts, so similar that they might be taken together, and therefore they were called on before us

(1) [1891] 2 Ch. 317.
(2) [1911] 1 Ch. 92.
(3) [1920] 2 K. B. 657, 675; [1921] 2 A. C. 171.
(4) [1893] 3 Ch. 337.
(5) 12 App. Cas. 385.
(6) [1904] 2 Ch. 621.
(7) [1923] A. C. 744.
(8) [1914] 1 K. B. 579.
(9) 14 App. Cas. 525.
(10) [1921] 2 A. C. 1.
(11) [1901] 2 Ch. 184; [1902] 2 Ch. 86.
(12) [1901] 2 Ch. 190*n*.
(13) [1922] 1 K. B. 347.
(14) [1923] 2 K. B. 447.

at the same time, and it was agreed that the judgment in the one case would cover the other. I am therefore giving the judgment in the case the facts of which we actually heard, the *Inland Revenue Commissioners* v. *George Burrell.*

This is an appeal by the Crown from a judgment of Rowlatt J. dated May 9, 1923, upon a case stated by the Commissioners for the Special Purposes of the Income Tax. George Burrell, the respondent, appealed against additional assessments to super tax in the sums of 5954*l.*, 85,520*l.* and 313*l.* for the years ending April 5, 1917, 1918, 1919, respectively, made upon him under the provisions of the Finance (1909–10) Act, 1910, and subsequent enactments imposing the super tax. These additional assessments were made in respect of part of the sums distributed on liquidation by twenty-three steamship companies hereinafter referred to, and received by the respondent and his wife respectively. It is unnecessary to state further details, which are to be found set out in the statements attached to the case.

The firm of Burrell & Son, of which the respondent is a partner, held shares, but not a controlling interest, in twenty-three companies, each of which was formed for the purpose of owning one particular ship. Mrs. Burrell, the wife of the respondent, also held shares in most of the companies in her own right.

Each of the companies had gone into liquidation in conformity with its articles of association, when the ship which it owned was sold, or lost. After any liabilities had been discharged, the assets of the company, including the profits earned from the commencement of the company's year, up to the date of the cessation of business, and also any undistributed profits of past years that had been accumulated and invested and held as reserve funds, were distributed among the shareholders; and each shareholder accordingly received in the liquidation a certain fraction of the profits of the year in which the business ceased, but which the company had not resolved to divide, and also of the accumulated profits in past years invested and held in reserve. The question to be decided is whether that portion of the assets

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of any one of the companies which represents undistributed profits, whether accumulated during past years or made during the broken year, forms part of the income of the recipient shareholder for super tax purposes, when distributed by the liquidator on the liquidation of the company.

It was contended on behalf of the Crown that undistributed profits retain their character as profits in the liquidation of the company and pass to the recipient as profits, unless validly capitalized before the liquidation of the company, and thus form part of the recipient's income for super tax purposes. The answer of the respondent was that the liquidator distributes the property of the company to the shareholders, and that no distinction ought to be drawn between one portion distributed and another, and that the liquidator could not and did not distribute any portion of the assets as income. Hence it followed that no part of the distribution in the liquidation of the companies could be regarded as income, in estimating the respondent's income for super tax purposes.

There had been pursuant to s. 40 of the Companies (Consolidation) Act, 1908, a sum of 83*l.* per share of 100*l.* returned to each shareholder. The case before the Commissioners and Rowlatt J. included a claim by the Crown that the sum so returned was also taxable; but in this Court the claim of the Crown was restricted to the demand that the two sums which I have referred to—namely, those representing accumulated and undivided profits, and the profits made during the broken year—should be treated as income and were taxable.

The Attorney-General argued that the mere fact of voluntary liquidation does not alter the character of the sums that reach the hands of the shareholders, that the profits made in the course of business remain profits whether they are distributed as dividends or accumulated as a reserve fund, that income tax has been paid upon them as being profits made by the company, and that although the quota due to each shareholder may have reached its ultimate destination in his hands not separated into its component

parts, yet it is easy to ascertain and determine what part of such quota is made up of earned and undistributed profits as distinguished from capital returned. These arguments no doubt are entitled to weight, and we were referred to two cases which it was claimed supported them.

In re Bridgewater Navigation Co. (1) was a case in which the proper allocation as between the ordinary and preference shareholders of certain reserve funds, accumulated out of profits, fell to be decided. The rights of the shareholders depended upon the articles of association. The question arose upon the sale of the undertaking to the Manchester Ship Canal, and was whether certain reserve funds were to be treated as undrawn profits, and ought to be divided among the ordinary shareholders exclusively, or whether those reserve funds were to be treated as assets divisible among both preference and ordinary shareholders. Lindley L.J. (2) states the problem that arises when capital and profits belong to different persons, or to the same persons in different proportions, and that the effect of capitalizing profits is to change their ownership, and adds that an intention to do this must be shown before the conversion of profits into capital can be properly inferred. He relied upon the speech of Lord Bramwell in *Bouch* v. *Sproule* (3), that in the case of an ordinary partnership, or an incorporated partnership, "the undivided profits of any period, a year, or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading."

Next the Crown relied upon *In re Spanish Prospecting Co.* (4) There certain creditors were entitled to be paid their salary, which was cumulative, out of any succeeding profits. The question was whether a balance in the hands of the liquidator after payment of all other creditors in full, and all subscribed capital had been returned to the shareholders, was to be treated as undrawn profits out of which these

(1) [1891] 2 Ch. 317.
(2) Ibid. 327.
(3) 12 App. Cas. 385, 405.
(4) [1911] 1 Ch. 92.

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creditors were entitled to be paid. It was held that they were so entitled, for this balance, when its origin was ascertained, was found to be profits.

These cases, however, do not in my judgment deal with, or govern, the problem that has to be solved in the present case—namely, whether the quota received by each shareholder is a part of his annual profits or gains, and so subject to super tax.

Super tax is imposed by s. 66 of the Finance (1909–10) Act, 1910, and has been continued, with alterations, not important to the present question, to the dates of the assessments in the present case. There is charged by the above section in respect of the income of any individual which exceeds a certain amount, an additional duty of income tax referred to as a super tax, and for the purposes of that tax, "the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts," with certain modifications which follow thereafter. In the course of estimating his income in accordance with the rules thus indicated, the subject had under s. 190 of the Income Tax Act, 1842, Sch. G, List XVII. (now Fifth Schedule, List XVII. of the Income Tax Act 1918), to make a declaration of ". . . . other annual payments, for which the party is liable to allow and deduct the duty": see the process clearly stated by Swinfen Eady L.J. in *Brooks* v. *Inland Revenue Commissioners*. (1) The sums in question have been made liable to the payment of income tax, but is the quota received by the shareholders an annual payment or in the nature of an annual payment of which a declaration has to be made?

These sums have not been distributed to the shareholders as dividends. The voluntary liquidation has deprived the directors of the power of declaring a dividend. These facts must be faced and due weight given to the considerations

(1) [1914] 1 K. B. 579, 587.

which arise from them. The rights of the Crown and the subject must be governed by what is, and not what might have been. Further it is a misapprehension, after the liquidator has assumed his duties, to continue the distinction between surplus profits and capital. Lord Macnaghten in *Birch* v. *Cropper* (1), the case which finally determined the rights inter se of the preference and ordinary shareholders in the Bridgewater Canal, said: "I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding up represented the capital of the company." As Lindley L.J. said in *In re Armitage* (2): "The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares": see also the observations of Stirling L.J. as to the meaning of profits available for dividends in *In re Crichton's Oil Co.* (3), where, upon a voluntary liquidation, a surplus of trading profit made in a particular year was held distributable rateably among all the shareholders, as capital, and was not to be devoted as profits in the payment of a cumulative preferential dividend.

Upon the grounds, and in accordance with the authorities, which I have up to this point stated and referred to, the Crown are not, in my judgment, entitled to charge super tax in accordance with the assessments made. It is not right to split up the sums received by the shareholders into capital and income, by examining the accounts of the company when it carried on business, and disintegrating the sum received by the shareholders subsequently into

(1) 14 App. Cas. 525, 546. (2) [1893] 3 Ch. 337, 346.
(3) [1902] 2 Ch. 86, 97.

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component parts, based on an estimate of what might possibly have been done, but was not done.

There is in addition a dictum of Scrutton L.J. directly in point: see *Inland Revenue Commissioners* v. *Blott.* (1) In that case the question was whether certain bonus shares allotted to a shareholder could be treated for purposes of super tax as part of his total income from all sources for the previous years within s. 66 above quoted. Rowlatt J. (2), the Court of Appeal (3) and the House of Lords (4) all decided in the negative. Scrutton L.J. in the course of his judgment dealt with the very point to be decided here. He said (1): "A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1.) their original capital, (2.) accretions to capital due to increase in the value of the assets of the company, (3.) the reserve fund of undivided profits in the company, (4.) the undivided profits of the last year of assessment. Heads (3.) and (4.) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super tax as assessment; they are not income from property, but the property itself in course of division."

No doubt this opinion was expressed obiter in the course of the judgment, but I agree with it. The quota returned to the shareholder is returned to him as that part of the property of the company to which he is entitled, by the officer whose duty it is to distribute the "property of the company" in accordance with s. 186 of the Companies (Consolidation) Act, 1908. That officer does not carry on the company as the directors did; and he has no longer the power that they had, to divide the profits as dividend upon the shares—profits, to which, in that character, the shareholder had no right to lay a demand.

There is nothing in the speeches of the majority or the minority of the House, when the case was determined by it on appeal, that countervails this view. (4) One point, however, was dealt with by Viscount Cave which has a

(1) [1920] 2 K. B. 657, 675.
(2) [1920] 1 K. B. 114.
(3) [1920] 2 K. B. 657.
(4) [1921] 2 A. C. 171.

bearing upon, and breaks, one of the links in the argument for the Crown. It was said that the fact that the profits in the hands of the company had paid income tax was of some importance, as illustrative of the character of an equivalent amount in the hands of the recipient, because the amount of tax paid, appropriate to the sum received, could have been deducted from it, as if paid on his behalf. Viscount Cave says (1): "Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment." For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

ATKIN L.J. The respondents in this case were the principal shareholders in a number of single-ship companies managed by the firm of Burrell & Son, in which the respondents are partners. The respondents have been assessed to super tax on sums received in respect of each of the companies, but the facts relating to one company, the Strathleven Steamship Company, Limited have been taken as illustrative of the whole. The *Strathleven* steamship was sold by the company in 1916 at a sum considerably exceeding that at which it stood in the company's books. The company thereupon went into voluntary liquidation. At that time it appears to have had in its possession investments and cash representing undivided profits amounting to 8799*l.* After deducting from that sum liabilities for creditors and income tax, the liquidator in the liquidation account brings out a balance of 4272*l.* There were also trading profits realized for the current year of 8842*l.*, and interest and dividends on investments for the current year, 582*l.* For the purpose of this case there are deemed to be deducted from those sums further expenses, audit fees, income tax and staff bonus, amounting to 2494*l.*; and the balance added to the sum of 4274*l.*, making 11,968*l.*, which thus arrived at forms part of the total sums distributed amongst the shareholders, of which the respondents received

(1) [1921] 2 A. C. 201.

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their shares, constitutes the subject of the assessments. It is said by the Crown that upon that sum income tax has been paid by the company; that when the shareholder claims in the liquidation any right or interest in it he must necessarily allow to the company the proportionate deduction of income tax already paid by the company; and that he must therefore bring into account in super tax the deduction so allowed. This is said to be the result of the Income Tax Act, 1842, ss. 40, 54, 190, Sch. G, List XVII., and the Finance (1909–10) Act, 1910, s. 66, sub-s. 2.

It was also put, as I understood, alternatively that the sum at the date of the liquidation represented profits, never ceased in the hands of the liquidator to be profits; was therefore distributed as profits; and being received by the shareholder as profits must be accounted for by him for super tax.

I think both arguments, if they are severable, are defective by not taking into account sufficiently the legal results of the winding up. The duties of a voluntary liquidator are governed by the Companies (Consolidation) Act, 1908, and subject to the Act by any express provisions in the articles of association. By s. 184 of the Act it is provided: "When a company is wound up voluntarily the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof: Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved"; and by s. 186: "The following consequences shall ensue on the voluntary winding up of a company: (i.) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company; (ii.) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them: (iii.) On the appointment of a liquidator all the powers of the directors

shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof: (iv.) The liquidator may, without the sanction of the Court, exercise all powers by this Act given to the liquidator in a winding up by the Court," and amongst those powers which are provided for by s. 151, sub-s. 2: "The liquidator in a winding up by the Court shall have power, but (subject to the provisions of this section) in the case of a winding up in Scotland or Ireland only with the sanction of the Court, —(*a*) To sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." The property of the company remains the property of the company. The liquidator's duty is to realize it, to pay off the liabilities and distribute the remaining assets amongst the shareholders subject to the rights given under the articles. The liquidator cannot declare a dividend or distribute a dividend. He deals with assets. He need not trouble himself with the question whether the assets in the company's books represent capital or uncapitalized profits. He can realize the assets in the most beneficial way and can pay capital liabilities out of the assets that represented profits, or liabilities on revenue account out of the assets that represented capital. Having paid the liabilities and having a lump sum in his hand there appears to me to be no liability in him to reconstruct his capital account or other accounts; and no power in the shareholders either to insist on the liquidator doing so, or themselves so to adventure. Of course, the property that comes to his hands, as it always remains the property of the company, is bound by the engagements of the company whether created by the articles or otherwise. Thus if the profits in the hands of the company are charged to a third person, the charge is operative against the liquidator. This, I think, is the case in *In re Spanish Prospecting Co.* (1) If the articles have given any particular body of shareholders the right to profits whether distributed or not, this

(1) [1911] 1 Ch. 92.

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(subject to the claims of the creditors) must be recognized in distribution by the liquidator, *In re Bridgewater Navigation Co.* (1) which turned upon a special article. But though the liquidator must honour such obligations he himself has no power to capitalize or decapitalize, to distinguish in his distribution between capital or income: his duty is simply to distribute assets. He may, while carrying on the business of a company, with a view to a beneficial realization, earn profits. In such a case the company will be assessable to income tax on such profits. But the shareholder will not receive them as profits; for him they are but an accretion to the assets; and if they become surplus assets, it is in that form that the shareholder will receive them. We are thus removed from the sphere of cases such as *Inland Revenue Commissioners* v. *Blott* (2), where there have to be considered the rights produced by the action of a company still carrying on its business and distributing some of its assets in some form of bonus. There the intention of the company is dominant for all purposes. Did the company intend to distribute as profits or as capital? Here the liquidator has no choice, and the question cannot arise in that form. The inquiry takes a different shape; not what does the liquidator intend to give the shareholder, but what does the shareholder in fact receive? In fact he receives his share of the joint stock, as Scrutton L.J. said in *Blott's Case* (3), not income of the property, but the property itself. In most cases it would require an elaborate analysis of the liquidation account to discover whether the sum received was profits or not. In the present case it is not easy to see why some expenses are deducted from the account and some not, or why they should not all be deducted from the sum received from the sale of the steamer; in any case I think that for the shareholder profits have ceased to be profits, and have become irrevocably merged in the total sum of assets and should not be treated for taxation as part of his annual profits or gains.

(1) [1891] 2 Ch. 317. (2) [1920] 2 K. B. 657.
(3) [1920] 2 K. B. 675.

The articles of association of this company do not appear to affect the legal position. The relevant articles appear to be these. Art. 67: "The company in general meeting, or the managers, with the sanction of the company in general meeting, may declare a dividend to be paid to the members according to their priority, and to the amount paid or deemed to be paid on their shares." Art. 68: "No dividend shall be payable except out of the profits, of whatever nature, arising, directly or indirectly, from the business or operations of the company, or from the property or reserve funds of the company, or from premiums on issue on shares or stock." Art. 69: "No dividend shall exceed the amount recommended from time to time by the managers and the declaration of the managers as to the amount of the profits available for dividend shall be conclusive." Then art. 77: "The managers may, before recommending or declaring any dividend on the ordinary shares, set aside out of the profits such sum as they may think proper to form a fund, herein referred to as the 'reserve fund,' to meet contingencies or depreciation in the value of the property of the company, or for insurance, or for equalising dividends, or of bonuses," and so on. Art. 78: "All moneys carried to the reserve fund, and all other moneys of the company not immediately applicable to or required for any payment to be made by the company may be either employed in the business of the company or be invested by the managers upon such securities," and so on. The remaining article is art. 99, and it is entitled: "Distribution of Assets on Winding Up." "If the company shall be wound up voluntarily and there shall be any surplus assets after payment of all debts and satisfaction of all liabilities of the company, such surplus assets shall, subject to any preferential rights and priorities appertaining to preference shareholders (if any), and after satisfying the same, belong to the holders of the ordinary shares in proportion to the amounts paid up or reckoned as paid up on such ordinary shares." This last article gives effect to the rights of shareholders as set out above.

It follows from what I have said that the argument of the

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Crown fails under both heads. The profits are not distributed or received as such. When their equivalent or any part of it is received by the shareholders as part of the surplus assets the obligation under the sections of the Income Tax Act, 1842, to make allowance for income tax paid is no longer operative. It is irrelevant to the new state of things. As when the company capitalizes undivided profits and distributes them as capital, say as bonus shares, the shareholder does not bring into account for super tax the income tax paid by the company thereon, so in the case of accumulated profits which have become surplus assets and are distributed and received as such.

I agree that the appeals should be dismissed with costs.

SARGANT L.J. The respondents, William Burrell and George Burrell, as partners in the firm of Burrell & Son, held shares in some twenty-three single-ship companies, and Mrs. George Burrell, the wife of the respondent George Burrell, also held shares in most of these companies in her own right. On the voluntary liquidation of each of these companies their surplus assets were distributed amongst their shareholders, and during the years ending April 5, 1916, 1917 and 1918, the two respondents and Mrs. George Burrell received in respect of their several shares their due proportion of such surplus assets. Assessments in respect of super tax have been made on the respondent William Burrell in respect of such parts of the sums so received by him as represented accumulated and current profits of these companies, and on the respondent George Burrell for such parts of the sums so received by him or by Mrs. George Burrell as represented the like accumulated and current profits. The respondents appealed against these assessments to the Special Commissioners for Income Tax, who allowed the appeals and stated cases for the opinion of the King's Bench Division. On the argument of that case Rowlatt J., by order dated May 9, 1923, confirmed the decision of the Special Commissioners, and these appeals are brought from those orders.

Each of the special cases finds, and it is agreed by the parties, that the facts in all the twenty-three cases are similar and that the facts in the case of one of these companies—namely, the Strathleven Steamship Company, Ld.—may be taken as typical of all the others; and further it was admitted by the Crown, on the argument in this Court, that the case for the assessment of super tax is in no way strengthened, though the amount assessed is increased, by the fact that the companies in which shares were held were numerous. In other words, liability to assessment in respect of parts of the proceeds of all the shares is in principle the same as if a single assessment had been made in respect of parts of the proceeds of one company only. Accordingly it is not necessary to refer to any case other than that of the Strathleven Steamship Company, Ld. (herein called "the company").

The company was a single steamship company of an ordinary type, formed in January, 1906, under the Companies Acts then in force with a memorandum and articles of association for the purpose of acquiring and turning to account a steamship then in course of construction, which was intended to be and was afterwards called the *Strathleven*. The memorandum of association provided that the capital of the company should be 24,000*l.* divided into 240 shares of 100*l.* each, all of which were in fact issued and fully paid and contained no power to own or operate any other ship; and by the contemporaneous articles of association it was provided, art. 98, as follows: "The duration of the company shall be for such period as it remains the owner of said vessel. Should said vessel be lost or sold the company shall be wound up, and the company in general meeting shall thereupon pass a resolution requiring it to be wound up voluntarily."

In the month of September, 1915, the company duly passed and registered a special resolution within s. 40 of the Companies (Consolidation) Act, 1908, under which out of the accumulated profits of the company there was to be returned to the shareholders a sum of 83*l.* in respect of each 100*l.* share, with the result that there would be a corresponding liability for unpaid capital in respect of each share;

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and such return was in fact made accordingly, the total amount of capital so returned being a sum of 19,920*l.* And in July, 1916, the *Strathleven* was sold for a sum of over 141,000*l.* less commission, and the company thereupon went into voluntary liquidation.

In this liquidation the total amount of surplus assets (that is, of the excess of assets over liabilities) to be distributed was 152,909*l.* 3*s.* 10*d.*; and of this total the case finds, though the exact figures do not matter, that a sum of 11,968*l.* 0*s.* 1*d.* represented profits of the company on which income tax had been paid by the company, about a third of this sum arising from accumulated profits of previous years, and about two-thirds arising from trading profits of the current year. For simplicity I will take round figures, and assume that a total of 12,000*l.* arose from profits, 4000*l.* representing accumulated profits and 8000*l.* current profits.

In this state of things an assessment for super tax was made on the respondents in respect of their proportion both of the 19,920*l.* representing capital returned out of accumulated profits and also of the 12,000*l.* representing current and accumulated profits, and the Special Commissioners, in disallowing these assessments, stated and I think quite accurately stated the point of law for the decision of the Court as being "whether that portion of the assets of a company which represents undistributed profits forms part of the income of the recipient for super tax purposes when distributed to the shareholders by the liquidator on the liquidation of the company."

On the argument before Rowlatt J. the appellants supported the assessment both in respect of the proportion of the 19,920*l.* representing capital returned out of profits, and in respect of the proportions of the 12,000*l.* representing accumulated and current profits. But on the appeal to this Court they abandoned the former of these assessments and confined themselves to supporting the latter of them. Their argument may be, and indeed was, summarized as follows: The company, prior to liquidation, and the liquidator in the course of the liquidation, made profits from the business which

were of the nature of income and on which income tax was in fact paid. Nothing whatever was done to convert these profits into capital before or when they reached the shareholder; and although they reached him together with capital in one lump sum they are clearly identifiable as profits of the nature of income. Such an identification has in fact been made in *In re Bridgewater Navigation Co.* (1) and in *In re Spanish Prospecting Co.* (2), and it follows therefore that, being thus identifiable and never having lost their primary character of profits of the nature of income, they must be treated in the hands of the shareholder as still retaining that character, and as being part of his annual income and therefore subject to super tax.

This argument is to my mind incomplete and defective in assuming that what is of the nature of income in the hands of the company is also prima facie of the nature of income in the hands of the shareholder. I do not think that there is any presumption of the kind. The character in which any distribution by the company amongst its shareholders reaches their hands depends entirely on the circumstances in which the distribution is made. In the liquidation of a limited company the distribution of the surplus assets of the company is almost necessarily of a final and non-recurrent character, and reaches the hands of the shareholders quite irrespective of the sources from which the assets have accrued to the company. It is true that so far as the assets can be identified, as here, as having arisen from profits, they might while the company was a going concern have been distributed by way of declaration of dividend; but though this power, if exercised, would have removed the assets from the ownership of the company and divided them amongst the shareholders by way of income, the mere existence of the power while unexercised cannot, in my judgment, have any effect of the kind. These assets, though capable of distribution as income, remain, while not so distributed, part of the general mass of the property of the company and are subject to the debts and all the accruing liabilities and possible losses of the company, and the expenses

(1) [1891] 2 Ch. 317. (2) [1911] 1 Ch. 92.

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of any liquidation; and I cannot see enough in the mere history of the accruer of the assets to the company to enable a distinction to be made for the present purpose between that part of a final distribution of assets of the company which arises from profits of the company capable of distribution as income, and the other parts of that distribution. A somewhat similar example is that of the purchase of stocks just after the declaration of a dividend and a sale of them just before the declaration of a new dividend at a profit which is practically based on the accrued dividend—a case in which I think that there can be no question of the increased price being taxable as income. And the decision in *Barnardo's Homes* v. *Special Income Tax Commissioners* (1) certainly tends in the same direction.

Nor do I think that the decisions in *In re Spanish Prospecting Co.* (2), and *In re Bridgewater Navigation Co.* (3), really assist the appellants here. In the former of these cases the question was merely whether the company had made profits so that an employee whose remuneration was dependent on the earning of profits was entitled to rank as a creditor; and the latter case turned on the effect of a special bargain between preference shareholders and ordinary shareholders, which was constituted by one of the articles of association of the company, and under which the ordinary shareholders were entitled to the whole of the annual profits of the company not required to satisfy the preference dividend, and so were exclusively entitled to reserve funds formed out of these surplus annual profits.

Had these particular shares been settled, it is clear that the whole of their proportion of these undistributed profits would, on the principles of *In re Armitage* (4), have been applicable not as income but as capital; and this is a strong indication that this proportion is capital and not income for revenue purposes also: see the reasoning of Lord Haldane in *Inland Revenue Commissioners* v. *Blott.* (5)

(1) [1921] 2 A. C. 1.
(2) [1911] 1 Ch. 92.
(3) [1891] 2 Ch. 317.
(4) [1893] 3 Ch. 337.
(5) [1921] 2 A. C. 171, 186, 187.

In my judgment the remarks of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (1), though made by way of illustration only and not constituting a definite authority, are well founded, and have not been shaken by the argument for the appellants. The appeals should be dismissed.

Appeals dismissed.

Solicitor for Crown : *Solicitor of Inland Revenue.*
Solicitors for respondents : *Murray, Hutchins & Co.*

W. I. C.

GAYLER AND POPE, LIMITED *v.* B. DAVIES AND SON, LIMITED.

1924 *March* 21 ; *April* 11.

[1923. G. 787.]

Trespass—Negligence—Pony bolting and damaging Shop Window and Contents.

For injury caused by horses or cattle to property on or adjoining a highway the owner is not liable in the absence of negligence or of wilful intention on his part.

Goodwyn v. *Cheveley* (1859) 4 H. & N. 631 and *Tillett* v. *Ward* (1882) 10 Q. B. D. 17 considered.

Dictum of Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, 767 applied.

The bolting of a horse which has been left unattended in a public street is prima facie evidence of negligence on the part of the owner.

Hammack v. *White* (1862) 11 C. B. (N. S.) 588 and *Manzoni* v. *Douglas* (1880) 6 Q. B. D. 145 considered.

Watson v. *Weekes* (unreported), cited in *Tolhausen* v. *Davies* (1888) 57 L. J. (Q. B.) 392 and *Snee* v. *Durkie* (1903) 6 F. 42 applied.

ACTION tried by McCardie J.

The plaintiffs, who were drapers occupying premises in Marylebone, claimed damages from the defendants in respect of the negligence or trespass of their servants, in these circumstances : About 6 A.M. on January 14, 1923, the defendants' pony and milk van, then being used for the purpose of milk supply to the defendants' customers, dashed through the plaintiffs' shop window and damaged a large

(1) [1920] 2 K. B. 657, 675.

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quantity of goods in the shop. No driver or other servant of the defendants was in sight at the time. In fact, as the judge found, the pony and milk van, being left unattended by the defendants' servants, bolted and caused the damage sued for.

The defendants denied trespass or negligence.

Clement Davies for the plaintiffs.

M. Berryman for the defendants.

The arguments sufficiently appear from the judgment.

April 11. McCARDIE J. read the following judgment: This case raises points of practical importance in the every-day litigation of the Courts. [His Lordship stated the facts and continued:] Mr. Clement Davies, in his able and ingenious argument on the first point in the case, submitted that on the facts mentioned the plaintiffs were entitled to recover damages on the ground that the defendants had by their horse and van actually trespassed in and upon the plaintiffs' premises, and that, therefore, quite apart from any question of negligence, the defendants were liable in trespass. It would be assumed at first sight that this contention of the plaintiffs could be met at once by direct decisions citable in the defendants' favour. But upon the arguments for the plaintiffs by Mr. Davies and for the defendants by Mr. Berryman it seems that no direct decision exists upon facts like those in this case, nor have I, upon research, been able to find any actual and definite decision on the point at issue. I have, however, a recollection both forensic and judicial of various cases in the Courts in which it has been undoubtedly assumed that on facts substantially similar to the present ones it is essential for a plaintiff to prove negligence. In the case of a motor car which ran into a plaintiff's shop and did damage the Court assumed that evidence of negligence by the defendant was required: see *Ruoff* v. *Long & Co.* (1) Mr. Clement Davies submits, in substance, that the hitherto existent practice of the Courts is

(1) [1916] 1 K. B. 148.

erroneous and that trespass lies in such a case as the present irrespective of negligence. If he be right in his contention then a new and striking aspect of the law arises. If the injury to the plaintiffs' property had taken place on the highway itself then, plainly, the plaintiffs would have to prove either wilful conduct or negligence by the defendants: see *Holmes* v. *Mather*. (1) Broadly put, the plaintiffs say, first, that a man is liable for the trespasses of his horses and cattle, and, secondly, that no sufficiently wide exception to that general rule exists here to save the defendants here from liability. I will examine those contentions. There can be no doubt as to the general rule that a man is liable for the trespasses of his cattle. The word "cattle" in this connection, of course, includes horses. Sir Frederick Pollock says, in his work on Torts, 12th ed., p. 502: "Cattle trespass is an old and well settled head (i.e. of liability), perhaps the oldest." The decisions on the point are many. A striking example is *Ellis* v. *Loftus Iron Co.* (2), where the defendants' horse injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants'. It was held by Lord Coleridge C.J. and Keating, Brett and Denman JJ. that there was a trespass by the defendants' horse for which the defendants were liable apart from any question of negligence on the part of the defendants. Brett J. put the matter strongly, and perhaps too widely, when he said (3): "Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass." This passage must, of course, be read subject to exceptions based on certain special sets of facts; for example, where the trespass has taken place by reason of a plaintiff's failure to fulfil his own obligation by prescription or agreement to keep up his fences

(1) (1875) L. R. 10 Ex. 261. (2) (1874) L. R. 10 C. P. 10.
(3) L. R. 10 C. P. 13.

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not only to restrain his own cattle within bounds but also to keep out those of neighbours: see Hunt on Boundaries and Fences, 6th ed., ch. 4; Gale on Easements, 9th ed., Part 3, ch. 8; and Pollock on Torts, 12th ed., p. 504. The normal obligation to keep one's cattle and horses from trespassing was emphasized by Blackburn J. in his well-known judgment in *Fletcher* v. *Rylands*. (1) It was clearly put by Williams J. in *Cox* v. *Burbidge* (2) when he said: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial." See, too, Salmond on Torts, 6th ed., pp. 471 et seq. The recent well-known case of *Manton* v. *Brocklebank* (3) contains many observations on the point. Thus, the general rule that a man is liable for the trespasses of his cattle, horses and the like is well settled. The roots of the rule, though buried in the past, still produce a living branch of tortious liability.

Apart from the special exceptions I have named and which do not bear on the present case, the question is whether further limitations to the rule exist which here can relieve the defendants from liability. Sir Frederick Pollock in his work on Torts, 12th ed., p. 504, puts the limitation as follows: "The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven: in such case the owner is liable only on proof of negligence, and the law is the same for a town street as for a country road." For this statement the distinguished author cites two decisions—namely, *Goodwyn* v. *Cheveley* (4) and *Tillett* v. *Ward*. (5) He adds in a note a reference to the opposite view by Littleton in the Year Book, 20 Edward IV. 11, pl. 10, cited in *Read* v. *Edwards*. (6) The words of Littleton are: "If a common

(1) (1866) L. R. 1 Ex. 265, 280.
(2) (1863) 13 C. B. (N. S.) 430, 438.
(3) [1923] 2 K. B. 212.
(4) 4 H. & N. 631.
(5) 10 Q. B. D. 17.
(6) (1864) 17 C. B. (N. S.) 245, 251. [The trespass complained of was by beasts straying off a common. *Qu.* what Littleton would have said of a street in a town.—F. P.]

road lies over the land of divers men, and if a drover come with his beasts and some of them go out of the way, he shall be punished in an action of trespass." The learned counsel for the plaintiffs here respectfully submitted that the exception is stated too broadly by Sir Frederick Pollock and that the two decisions mentioned do not support the exception in its full breadth. He submitted that the limitation on the general rule of liability for cattle trespass only applied where the cattle being lawfully driven along the highway without negligence trespassed on a plaintiff's land through some open gateway or open doorway or path or through some fence-gap, or the like, and that the limitation had no application to a case where, as here, a pony dashed through a window enclosing the plaintiffs' premises. This argument calls for attention. The point is curious and interesting. The decisions are equally curious and interesting. Let me take *Goodwyn* v. *Cheveley*. (1) There the plaintiff's cattle, whilst being driven along the highway, strayed into the defendant's field through a gap in the fence. The defendant impounded them on the ground of damage feasant in his close. The plaintiff replied that the cattle escaped into the close in consequence of the fence being out of repair. The defendant rejoined that after the plaintiff had notice that the cattle were in the close a reasonable time elapsed during which they might and ought to have been driven out and were not. Upon that the plaintiff took issue. The case really turned on the question whether in the circumstances the defendant was entitled to impound the cattle. Bramwell B. said: Yes, he was so entitled. Pollock C.B. and Martin and Channell BB. said no. The dicta, however, are of interest. All the judges apparently laid stress on the point that the fence was out of repair and therefore opened a gap to straying cattle. Bramwell B. said (2): "The plaintiff was not justified in allowing his cattle to trespass on the defendant's land. He had a right to take his cattle along the highway; and, when cattle are driven along a highway, if there are no fences to the adjoining land it is certain that the cattle will stray.

(1) 4 H. & N. 631. (2) 4 H. & N. 638, 640.

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That is an unavoidable injury which persons whose lands border on a highway must sustain." Martin B. said: "If a person will neglect to fence he must put up with the inconveniences consequent upon it." Pollock C.B. said much the same thing. It is obvious, therefore, that the facts in *Goodwyn* v. *Cheveley* (1) were quite different from the facts here and that the judges rested their views largely on the circumstance that the state of the fence presented an opening to the cattle. I take next *Tillett* v. *Ward*. (2) The headnote correctly states the facts in, and the result of, that decision. It is this: "An ox belonging to the defendant and while being driven by his servants through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved: *Held*, that the defendant was not liable." Mr. Clement Davies, for the present plaintiffs, points out that the ox in *Tillett* v. *Ward* (2) entered the plaintiff's premises through an open place, and he submits that the decision was, in substance, based on that point. It is now perhaps forgotten that the decision in *Tillett* v. *Ward* (2) roused much discussion and doubt in the legal world. It was, for example, vigorously criticized in vol. 27 of the Journal of Jurisprudence (Scottish), p. 347, and was defended, for example, in 27 Solicitor's Journal 595 (July 7, 1883). It must be taken, I think, as a decision marked by novelty. Lord Coleridge C.J., who gave the first judgment, pointed out that for trespass by a defendant's animal whilst on a highway a plaintiff could not recover unless he proved negligence. I need not pause to criticize the word "trespass" as so used by the learned Lord Chief Justice. Lord Coleridge then says: "We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss." I presume that the learned Lord Chief Justice meant to add the words "without negligence." Thus, says plaintiffs' counsel, the substantial

(1) 4 H. & N. 631. (2) 10 Q. B. D. 17, 20, 21.

ratio of the judgment I have cited was that the plaintiff's shop door was open. But I must point out that the Lord Chief Justice proceeded as follows: "There is also the statement of Blackburn J. in *Fletcher* v. *Rylands* (1) that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk." Again, I do not pause to analyze the words "inevitable risk." The Lord Chief Justice then added that he saw no distinction, for the purposes of the case, between a field in the country and a street in a market town, and that the "accident to the plaintiff" was one of the necessary and "inevitable" risks which arise from driving cattle in the streets in or out of town. The judgment of Stephen J. is short. He refers to the general rule as to a man's liability for trespass by his cattle, and adds: "But while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing." The learned judge then proceeds: "The case of *Goodwyn* v. *Cheveley* (2) seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life." With all respect to Stephen J. I doubt greatly whether *Goodwyn* v. *Cheveley* (2) established any such wide exception. Finally Stephen J. said: "I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town." Counsel for the plaintiffs again submits that the ratio of Stephen J. was based really on the fact that the plaintiff's shop in *Tillett* v. *Ward* (3) was "open." I confess that I appreciate fully the criticisms by Mr. Clement Davies on *Tillett* v. *Ward*. (3) It is difficult to determine the actual grounds of the decision and the emphatic use of the word "open" in both judgments tends to confusion. But, curiously enough, *Tillett* v. *Ward* (3) seems to have

(1) L. R. 1 Ex. 265, 286. (2) 4 H & N. 631.
(3) 10 Q. B. D. 17.

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been regarded by both the Courts and the profession as if it were a clear crystallization of a broad principle as settled by earlier authority. It is obvious, however, that the learned authors of Clerk and Lindsell on Torts regard the decision as one for comment: see 7th ed., pp. 443–4. Yet in Salmond on Torts, 6th ed., p. 277, the broad principle as to property adjoining the highway seems to be recognized, although I confess that the actual illustration given by the learned author is open to comment. What is the basis of the practice which has, I think, been applied by the Courts for the last thirty years—namely, that where horse or cart or motor car or bicycle come upon a plaintiff's premises adjoining a highway in consequence of a street accident the defendant is not held liable in the absence of negligence or wilful intention? Is the practice sound? On what principle does it rest? In my view that principle is to be found not in the case of *Goodwyn* v. *Cheveley* (1) nor, perhaps, in the actual ratio of *Tillett* v. *Ward* (2), but rather in the recognition (sometimes perhaps unconscious) by the Courts and the profession of the good sense and weight of a passage in a judgment of Lord Blackburn in *River Wear Commissioners* v. *Adamson*. (3) Strangely enough, that important passage is not cited in the majority of text-books dealing with torts; but it is referred to in Addison on Torts, 8th ed., p. 704, and is cited in Beven on Negligence, vol. i., p. 441. To my mind it is the key to the modern practice. It is desirable to set out the passage here so that it may be remembered to-day when there is an ever-growing recognition by some of the importance of principle and of the need for a greater co-ordination of case law. Lord Blackburn said: "My Lords, the common law is, I think, as follows: Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which

(1) 4 H. & N. 631. (2) 10 Q. B. D. 17.
(3) 2 App. Cas. 743, 767.

is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some third person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner." The noble Lord then proceeds to show the need for proof of negligence in such a case. I am unable to understand why this passage was not cited in *Tillett* v. *Ward* (1), for I confess that I can see no distinction between alleged trespass by a horse and carriage and alleged trespass by an ox. It is, however, right to say that the judges in *Tillett* v. *Ward* (1) had before them an earlier dictum by the same great lawyer (then Blackburn J.) to somewhat the same effect: see *Fletcher* v. *Rylands*. (2) Whether the common law rule was in earlier days as Lord Blackburn stated it in *River Wear Commissioners* v. *Adamson* (3) in 1877, I do not inquire. It is, I think, the rule which has come into existence and which has for the past generation been followed by the Courts. It must now be taken, I think, that *Tillett* v. *Ward* (1) did not turn on the fact that the trespass was there committed through an open doorway. The ratio must be taken to have been a broader one. I shall apply here the rule stated by Lord Blackburn. I venture to think that it is just and convenient and agreeable to modern notions and everyday life. In substance Lord Blackburn applied to injury to persons or property adjoining the highway a rule like that established in *Holmes* v. *Mather* (4), with respect to injury to persons or property on the highway itself. It is a rule, moreover, which is in substantial harmony with *Phillips* v. *Britannia Hygienic Laundry Co.* (5), and with such cases as *Manton* v. *Brocklebank*. (6) I respectfully agree, therefore, with the statement of Sir Frederick Pollock in his work on Torts, 12th ed., p. 504. I hold that the

(1) 10 Q. B. D. 17.
(2) L. R. 1 Ex. 265, 286.
(3) 2 App. Cas. 743, 767.
(4) L. R. 10 Ex. 261.
(5) [1923] 1 K. B. 539, 552, 553; affd. [1923] 2 K. B. 832.
(6) [1923] 2 K. B. 212.

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plaintiffs cannot recover here on the ground of trespass There is, I need scarcely add, no suggestion that the injury was intentional.

It follows therefore that the plaintiffs must prove negligence. Mr. Berryman for the defendants submitted at the close of the plaintiffs' case that there was no evidence of negligence. His argument was that inasmuch as the plaintiffs proved no more than that the pony with the van had dashed through the plaintiffs' window into the shop, this fact, in view of the nature of horses, was not inconsistent with care by the defendants' servants and hence afforded no prima facie evidence in favour of the plaintiffs. This is a practical point which often arises, and it is well to consider it briefly. Several decisions are concisely referred to in Sir Frederick Pollock's work on Torts, 12th ed., p. 448. The defendants here placed their main reliance on *Hammack* v. *White* (1) and *Manzoni* v. *Douglas* (2)—two cases generally cited to show that the unexplained bolting of a horse is of itself no prima facie evidence of negligence. I confess that an examination of the actual decisions in those two cases leads me to the conclusion that they did not go to the extent generally assumed. In *Hammack* v. *White* (1) the defendant was trying a newly purchased horse in Finsbury Circus which was and is a much frequented thoroughfare. The horse, for some unexplained reason, became restive, ran upon the pavement and there killed a man. His widow brought an action under Lord Campbell's Act, but failed. The Court held that there was no evidence to go to a jury. It is plain, however, that when the evidence for the plaintiff was viewed as a whole it appeared upon that very evidence that the defendant had taken well directed efforts to control the horse, and that the horse got on the pavement in spite of, and not because of the absence of, those efforts. So, too, in *Manzoni* v. *Douglas* (2) the plaintiff failed because the evidence called on his behalf itself disclosed that the defendant's driver had made the utmost efforts to control the horse and brougham which caused the injury to the plaintiff.

(1) 11 C. B. (N. S.) 588. (2) 6 Q. B. D. 145.

As decisions on the actual facts *Hammack* v. *White* (1) and *Manzoni* v. *Douglas* (2) may be perfectly correct. But the dicta appear to go beyond the decisions, and it is the dicta rather than the decisions which are usually cited in the Courts. I observe, however, that in Beven on Negligence, vol. i., pp. 116 et seq., the learned author very properly looks at the actual decisions rather than the passing observations. I need not refer to the dicta in *Hammack* v. *White*. (1) They are ambiguous. But I must mention the often cited words of Lindley J. in *Manzoni* v. *Douglas* (3) where he said: "To hold that the mere fact of a horse bolting is per se evidence of negligence would be mere reckless guesswork. To entitle him to recover in an action of this kind, the plaintiff must make out a clear prima facie case by evidence which will warrant an inference of negligence." If the learned judge be correctly reported, I can only say, with great respect, that he goes, I think, too far. Indeed, the words I have quoted are inconsistent with his own prior words when he said: "The plaintiff was lawfully walking on the foot pavement of a public thoroughfare, and was knocked down by a horse drawing the defendant's brougham. If the case had been left there, it might be that the defendant was liable for the negligent driving of her servant." I respectfully agree with the passage last cited. I fully appreciate, of course, the distinction between animate things, such as horses, and inanimate things, such as bales of goods. The distinction was rightly pointed out in *Manzoni* v. *Douglas* (2), where many cases were cited, including *Byrne* v. *Boadle* (4): see also the useful observation of Avory J. in *Ruoff* v. *Long & Co.* (5) I myself, however, assent to the view expressed by an eminent Canadian judge who said: "I think the reasonable view of the law, and of the ordinary transactions of human life is, that if a man's horses galloping through a street run on and injure a passenger on the side walk, a case of prima facie wrong is shown. It may be fully explicable,

(1) 11 C. B. (N. S.) 588.
(2) 6 Q. B. D. 145.
(3) 6 Q. B. D. 153.
(4) (1863) 2 H. & C. 722, 726.
(5) [1916] 1 K. B. 148, 152.

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but I think it calls for explanation" : per Hagarty C.J. in *Crawford* v. *Upper* (1), cited in Beven on Negligence, vol. i., p. 116. If, for example, a man, just as he has passed the Law Courts, and whilst walking on the pavement, is suddenly knocked down and injured by an unattended horse and cart which has dashed out of Chancery Lane, I should myself hold there was a prima facie case of negligence. To rule otherwise would, in my view, be against legal principle and against the good sense of those who are familiar with equine peculiarities. If Lindley J. meant to rule to the contrary I respectfully differ. The view I now take is strongly supported by the judgment of Mathew and Smith JJ. in *Tolhausen* v. *Davies*. (2) In giving the judgment of the Court Smith J. said : "I held in the (unreported) case of *Watson* v. *Weekes and Another* on March 19, 1887, in which I was affirmed by the Court of Appeal on April 1, 1887, that upon proof given by a plaintiff that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly nonsuit, for that such facts were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used." It is curious that this passage is not referred to in the majority of the able text-books on Torts, although it is of great importance on the question of prima facie evidence.

In my humble view the dicta in *Hammack* v. *White* (3) and *Manzoni* v. *Douglas* (4) must be deemed unsound if and in so far as they conflict with the view of the Court of Appeal as stated by the Divisional Court in *Tolhausen's Case*. (2) I observe that in Clerk and Lindsell's excellent work on Torts, 7th ed., p. 458, the learned authors cite *Hammack* v. *White* (3) and *Manzoni* v. *Douglas* (4) for the proposition that the mere unexplained bolting of a horse does not constitute conclusive evidence of negligence on the part of the person in charge of it. With this proposition I fully agree, but I point out that

(1) (1889) 16 Ont. App. 440, 444.
(2) (1888) 57 L. J. (Q. B.) 392, 394; affd. 58 L. J. (Q. B.) 98.
(3) 11 C. B. (N. S.) 588.
(4) 6 Q. B. D. 145.

it is not the proposition with which the two cases were dealing. They were dealing with prima facie and not conclusive evidence. In Salmond on Torts, 6th ed., p. 32, the able author refers to *Manzoni* v. *Douglas* (1) as a decision of the Court of Appeal. I point out that the case was heard by a Divisional Court consisting of Denman and Lindley JJ. and not by the Court of Appeal. The view I have ventured to express is not inconsistent with *Holmes* v. *Mather*. (2) It is agreeable to *Simson* v. *London General Omnibus Co.* (3) and is strongly supported further by the view expressed in the Scottish case of *Snee* v. *Durkie* (4), where a powerful Court ruled that where a runaway horse and carriage runs down a person in broad daylight in a public street the presumption is that the owner of the horse and carriage is in fault. So here I hold that when a pony and van, wholly unattended, dash into a plaintiff's shop window adjoining a highway there is a prima facie case of negligence. The fact calls for explanation. This, I think, follows the view of the Court of Appeal as stated by Smith J. in *Tolhausen's Case*. (5) At one time I thought it might be necessary in this case to examine closely the decisions as to negligence by leaving unattended a horse or a horse and cart. *Illidge* v. *Goodwin* (6) and other cases were cited. I need only refer to Clerk and Lindsell on Torts, 7th ed., pp. 152, 457, 465; Addison on Torts, 8th ed., pp. 57, 712; and particularly to Beven on Negligence, vol. i., pp. 545, 546. I also refer to *Ruoff* v. *Long & Co.* (7), previously cited, and *Martin* v. *Stanborough* (8), just decided by a Divisional Court upon the question of leaving a motor car unattended. *Ruoff* v. *Long* (7) was there considered. A motor car is, I presume, to be viewed as an inanimate thing, and special considerations may apply thereto. In the view, however, which I take of the present facts I do not think such analysis is here necessary, though doubtless the point will call for consideration in some future

(1) 6 Q. B. D. 145.
(2) L. R. 10 Ex. 261.
(3) (1873) L. R. 8 C. P. 390.
(4) 6 F. 42.
(5) 57 L. J. (Q. B.) 392.
(6) (1831) 5 C. & P. 190.
(7) [1916] 1 K. B. 148.
(8) (1924) 40 Times L. R. 557.

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case. In that event I hope that the English decisions and text-books will be remembered in conjunction with the Scottish cases of *Macfarlane* v. *Colam* (1) and *Hendry* v. *M'Dougall*. (2)

[His Lordship then examined in detail the evidence given by the defendants' servants who were sent out with the pony and van, and came to the conclusion that the accident was due to the negligence of those servants in leaving unattended the pony, which to their knowledge was of such a character as to require careful watching lest it should bolt. He gave judgment for the plaintiffs for 145*l*.]

Judgment for plaintiffs.

Solicitor for plaintiffs: *Harvey Clifton.*
Solicitor for defendants: *F. J. Berryman.*

J. S. H.

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March 14, 17, 18; *April* 9.

W. H. BRAKSPEAR AND SONS, LIMITED *v.* BARTON.

[1922. W. 904.]

Landlord and Tenant—Increase of Rent—Standard Rent—Increase "since March 25, 1920"—Licensed Premises—Lease—"Tie" Clause—Discount—Repairs—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1; *s.* 2, *sub-ss.* 1 (*d*), 3, 6; *s.* 8; *s.* 12, *sub-ss.* 1, 7; *s.* 14.

In 1910 the defendant became tenant to the plaintiffs of licensed premises at Henley upon a lease for three years at a yearly rent of 75*l*. The lease contained the usual tied covenant as to the purchase of beer, wines and spirits. On the expiration of this lease the defendant continued in possession, receiving a discount of 10 per cent. in respect of the tied prices. In 1914 and 1917 respectively further leases of the premises for three years each were granted to him. On December 14, 1920, the plaintiffs granted a further lease to the defendant, by which he was to hold the premises for seven years from March 25, 1920. This lease contained the tied covenant as before, but there was no provision for a discount in favour of the defendant on goods bought, and his obligations to repair were increased. The plaintiffs claimed rent, and payment for goods sold and delivered; the defendant counterclaimed,

(1) 1908 S. C. 56. (2) 1923 S. C. 378.

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alleging that a discount of 10 per cent. was due to him on the price of goods bought, and pleading the Rent Restrictions Act, 1920:—

Held, that the Rent Restrictions Act, 1920, s. 1, applied, and that by the lease of December 14, 1920, the rent had been increased "since March 25, 1920."

Raikes v. *Ogle* [1921] 1 K. B. 576 followed.

Held, also, that the standard rent was 75*l.*, being the rent provided by the lease of 1910, and that, as no notice of increase had been served, the rent reserved by the lease of 1920 must be reduced accordingly, but that in other respects that lease was valid and binding.

Glossop v. *Ashley* [1921] 2 K. B. 451; [1922] 1 K. B. 1 followed.

Dufty v. *Palmer*, ante p. 35, distinguished.

Held, also, that both the tied covenant in the lease and the discount for goods supplied under the tie must be disregarded for the purposes of the Rent Restrictions Acts.

Westminster and General Properties and Investment Co. v. *Simmons* [1919] W. N. 241; *Isaacs* v. *Titlebaum* [1920] W. N. 29; *Lawrie* v. *Woods* [1920] 2 I. R. 106; *Mackworth* v. *Hellard* [1921] 2 K. B. 755; and *Glossop* v. *Ashley* [1921] 2 K. B. 451, 459; [1922] 1 K. B. 1 followed.

Held, lastly, that as the High Court, by the Rent Restrictions Act, 1920, s. 2, sub-s. 6, had no jurisdiction to deal with the question of repairs, final judgment must be postponed until the county court judge had given his decision on this point.

ACTION tried before McCardie J.

The plaintiffs were the landlords and the defendant the tenant of certain licensed premises known as the "Catherine Wheel" Hotel, Henley-on-Thames, in the county of Oxford. These premises had been held by the defendant from the plaintiffs upon various agreements and at various rentals since March 17, 1910, when they were first demised to the defendant, until March 25, 1913, at a yearly rent of 75*l.* According to the statement of claim they were now held by the defendant upon a lease dated December 14, 1920, for a term of seven years from March 25, 1920, at a yearly rent of 120*l.* The plaintiffs alleged that the defendant had paid no rent in respect of the premises since March 25, 1920, and they claimed rent in respect thereof, and also a sum of 500*l.* for goods sold and delivered.

In his defence the defendant alleged that by the above-mentioned lease of December 14, 1920, the rent had been unlawfully increased contrary to ss. 1, 2 and 3, of the Rent Restrictions Act, 1920, and further, that the plaintiffs had transferred to the defendant liabilities previously borne by

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the plaintiffs, thus still further increasing the rent contrary to that Act. He also pleaded that the plaintiffs had contravened s. 8 of the Act of 1920 by requiring under the lease of December 14, 1920, as a condition for renewing the tenancy, the payment of net prices for liquors without allowing a discount of 10 per cent. previously obtaining. He further expressed his willingness to pay the rent properly due to the plaintiffs, but pleaded that the terms of the tenancy were less favourable than before, and that this question, inasmuch as it was within s. 2, sub-s. 6, of the Act of 1920, could only be determined by the county court. He also claimed a discount of 10 per cent. on sums paid by him for goods sold and delivered by the plaintiffs up to the date of the issue of the writ (March 8, 1922), by way of (*a*) set-off, and (*b*) counterclaim.

The plaintiffs also claimed from the defendant (*a*) rent, (*b*) the price of goods sold and delivered in respect of the Little White Hart Hotel, Henley, which was held by the defendant from them upon a lease dated December 14, 1920, for a term of seven years as from March 25, 1920, at a yearly rent of 30*l*. The plaintiffs further claimed rent in respect of Little White Hart Cottage, Henley, which was held by defendant as their tenant at a yearly rent of 13*l*.

The points at issue here material in respect of the Little White Hart Hotel and Cottage did not differ from those raised in respect of the Catherine Wheel Hotel, and it is not necessary to refer to them at length in this report.

The facts and arguments in the case are sufficiently set out in the judgment.

Merriman K.C. and *Moresby* for the plaintiffs.
Holman Gregory K.C. and *Earengey* for the defendant.

Cur. adv. vult.

April 9. McCARDIE J. read the following judgment: The complexity of this action will be inferred when I state that the many questions at issue arise from the prolific parents of litigation—the Rent Restrictions Acts. The arguments took several days. Many sections and decisions were cited

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to me. Even the facts are somewhat intricate, though to a substantial extent they are not in dispute. Several definite questions of fact, however, will call for decision.

The main claim by the plaintiffs is for rent due. The defendant by his counterclaim demands a heavy sum, and he bases his demand on the asserted operation of the Rent Restrictions Acts in his favour as hereafter stated.

The case relates to three distinct sets of premises—namely, the Catherine Wheel Hotel, the Little White Hart Hotel, and Little White Hart Cottage—all at Henley-on-Thames. The points raised by the defendant show, in my view, the discreditable devices to which a defendant may resort when invoking the Rent Restrictions Acts. Those Acts have, I think, gravely impaired the standard of honesty on the part of many. The plaintiffs are brewers at Henley. They are the owners of the three sets of premises I have named. By three separate indentures, each dated December 14, 1920, the plaintiffs leased to the defendant those three sets of premises. Separate points (apart from the common points) apply to each of the premises. The only convenient way of dealing with the case and of avoiding confusion is to take the premises separately. I can then, when dealing with the first set, express my view on points which apply also to the three sets. When dealing later with the second and third sets my task will thus be shortened.

I take, to begin with, the Catherine Wheel Hotel. It is fully licensed. It has about fifteen bedrooms and the usual coffee and smoke rooms, bars, kitchen and appurtenances. It is agreed that the rateable value at all material times is 68*l.* It was let to the defendant, by lease dated December 14, 1920, for seven years from March 25, 1920, at 120*l.* per annum, with various covenants, which I need not at present deal with. If the rent of 120*l.* cannot stand, then the standard rent must be either 68*l.* or 75*l.* for reasons I will give later. Now that is all I need say in announcing the first point taken by the plaintiffs—namely, that the Rent Restrictions Acts do not apply at all to licensed premises such as these. If this point had been taken six years ago,

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much might have been, I think, said for it. It might well be argued that "dominant purpose" was the test, and that business premises were none the less business premises because a manager or caretaker and his family happened to reside on the premises for the purposes of the trade. But, as I indicated to the plaintiffs' counsel in the course of the argument, the point comes far too late. The Court of Appeal held in *Epsom Grand Stand Association* v. *Clarke* (1) that licensed premises, including apparently beer and spirit shops in the main street of a big town, were "dwelling houses" within the Rent Restrictions Acts. The confusion caused by that decision has been considerable. In *Waller & Son* v. *Thomas* (2) I dealt with the effect of the decision of the Court of Appeal in the *Epsom Case*. (1) Apparently the later Rent Restrictions Acts do (in view of the *Epsom Case*) now treat public-houses (though what that phrase may include I know not) as within the Acts: see, for example, s. 12, sub-s. 2 (ii.), of the Act of 1920, and s. 5, sub-s. 1 (i.), of the same Act as it appears in s. 4 of the Act of 1923. It is, I must mention, pointed out by the defendant's leading counsel here that the lease of December 14, 1920, contains a clause (No. 5) that the defendant shall reside on the premises. I must, with regret, hold that the Rent Restrictions Acts do apply to the "Catherine Wheel" Hotel.

The second point as to the "Catherine Wheel" arises thus. The words of the lease are: "To hold the said premises with the appurtenances unto the tenant from the 25th day of March 1920 for the term of seven years . . . . at the yearly rent of 120*l*." Now it is admitted by the plaintiffs that the rent up to March 25, 1920, was less than 120*l*., and I shall have to decide later what the earlier rent in fact was. The plaintiffs submit that, assuming the premises to fall within the Rent Restrictions Acts, yet there has been no increase of rent here falling within s. 1 of the Rent Restrictions Act, 1920, which provides, so far as I need set it out: "Subject to the provisions of this Act, where the rent of any dwelling house to which this Act applies . . . . has been, since the 25th

(1) [1919] W. N. 170. (2) [1921] 1 K. B. 541, 553, 554.

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of March 1920 or is hereafter increased then . . . . if the increased rent . . . . exceeds by more than the amount permitted under this Act the standard rent . . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant." The argument for the plaintiffs is that there has been no increase "since" March 25, 1920. The date of the Rent Act was July 2, 1920. The date of the lease, be it noted, was December 14, 1920. The words of the lease are "*from* the 25th day of March 1920." The plaintiffs submit that inasmuch as the increased rent began to operate on and including March 25, 1920, and so began to accrue on that date, there has been no increase since March 25, 1920. Now the question here at issue cannot be appreciated until I refer to *Goldsmith* v. *Orr*. (1) There the Court of Appeal had to consider the meaning of the words "since the 25th of December 1918"—i.e., in respect of an increase of rent as dealt with in the Rent Restrictions Act, 1919, s. 4, sub-s. 1. For the purposes of this action the words of the Act of 1920 are the same as the words of the Act of 1919. Bankes L.J. held that the material date to be considered on the question when an increase of rent is made is the date on which the increase becomes effective, and not the date when the increase was agreed on between the parties. Scrutton L.J. apparently took the same view. Thus then the Court of Appeal held that the test is, When did the increase become effective? Warrington L.J. (dissenting) said that the test was, When did the parties agree upon an increase? I think personally that there is great weight in the view of Warrington L.J., but I am bound by the opinion of the majority of the Court.

Now in the action before me the parties agreed on the increase in December, 1920. If then the test of Warrington L.J. were to be applied there is plainly here (however unfortunately it may be for the plaintiffs) an increase since March 25, 1920. But if I apply, as I must the test of the majority of the Court in *Goldsmith* v. *Orr* (1), then the question is as to when the increase agreed on

(1) [1920] W. N. 250.

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in December, 1920, became effective. The new lease of that month ran back to March 25, 1920, as the habendum states. The words of the lease are, as I have said, "from the 25th day of March 1920." Thus the plaintiffs rely, to begin with, on *Goldsmith* v. *Orr*. (1) But the defendant says that even accepting the test of *Goldsmith* v. *Orr* (1) as correct, yet there is a decision which covers the point now in discussion. They refer to and rely on *Raikes* v. *Ogle* (2), where Acton J. had before him a point really indistinguishable from the present. He held on s. 1 of the Rent Restrictions Act, 1920, (*a*) that the material date was the date when the increased rent began to accrue—thus following the apparent opinion of the majority in *Goldsmith* v. *Orr* ; and (*b*) that upon a letting from March 25, 1920, at an increased rent the rent began to accrue on March 26, 1920, and not on March 25, 1920 ; and (*c*) that therefore there had been an increase since March 25, 1920, under s. 1 of the Rent Restrictions Act, 1920. The words of the lease there, as here, were " from March 25, 1920." The defendant submits that this decision in *Raikes* v. *Ogle* (2) is correct, and that I should follow it. The plaintiffs submit that it is erroneous, and that I should not regard myself as bound by it. I confess that I feel somewhat embarrassed by the powerful arguments of the plaintiffs' counsel. I will assume that the word " since " has the same signification as the word " from." Counsel on both sides invited me so to assume, though I myself have doubt upon this point. Upon that assumption it is plain that *Raikes* v. *Ogle* (2) is adverse to the plaintiffs here, but it is submitted in their behalf that it is contrary to the weight of authority. I had the advantage of a close examination by learned counsel of many decisions. In reviewing those decisions it is well to remember the considered judgment of Lord Lindley and Lord Halsbury in *Sidebotham* v. *Holland* (3), in which is was said by Lindley L.J. in delivering the joint judgment : " When considering the validity of a notice to quit given in time and expiring on the anniversary

(1) [1920] W. N. 250. (2) [1921] 1 K. B. 576.
(3) [1895] 1 Q. B. 378, 382, 384.

of the commencement of a tenancy, I can find no distinction ever drawn between tenancies commencing 'at' a particular time or 'on' a particular day and 'from' the same day. 'At,' 'on,' 'from' and 'on and from' are for this purpose equivalent expressions." Such was the view of the majority in *Sidebotham* v. *Holland*. (1) The words "as" "from," etc., which I have just cited seem to have acquired a technical signification in several contexts. It would perhaps have been better to take the word "since" by itself in the Rent Restrictions Act, 1920, for it is a word unencumbered with the subtle amplitudes of many balanced judgments.

Now the plaintiffs' counsel here says that the bulk of authority is against the correctness of the decision in *Raikes* v. *Ogle*. (2) Reference was made (inter alia) to the history of the word "from" as recounted by Lord Mansfield in *Pugh* v. *Duke of Leeds*. (3) He points to the words of the majority of the Court of Appeal in *Sidebotham* v. *Holland* (1), to the decision of Parke B. in *Russell* v. *Ledsam* (4), to the judgment of Warrington J. in *English* v. *Cliff* (5), and in particular he relied on the strong body of opinion (including the view of the Lord Chancellor) in the Irish case of *Wilkins* v. *M'Ginity*. (6) He also argued, with no little force, that the case of *Goldsmiths Co.* v. *West Metropolitan Ry. Co.* (7) was in his favour.

On the other hand, Mr. Holman Gregory for the defendant referred (inter alia) to *Page* v. *More* (8); *Ackland* v. *Lutley* (9), *Meggeson* v. *Groves* (judgment of Peterson J.) (10); and to various text-books, including the summary of cases given in the valuable work by Mr. Redman on Landlord and Tenant, 7th ed. p. 143.

If the matter stood as res integra, and I had been asked to decide for the first time on the meaning of the word "since" in s. 1 of the Rent Restrictions Act, 1920, it might perhaps be that my view would differ from that expressed

(1) [1895] 1 Q. B. 378, 382, 384.
(2) [1921] 1 K. B. 576.
(3) (1777) 2 Cowp, 714.
(4) (1845) 14 M. & W. 574, 582.
(5) [1914] 2 Ch. 376, 383.
(6) [1907] 2 I. R. 660.
(7) [1904] 1 K. B. 1.
(8) (1850) 15 Q. B. 684.
(9) (1839) 9 Ad. & E. 879.
(10) [1917] 1 Ch. 158, 164.

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by Acton J. in *Raikes* v. *Ogle*. (1) It is plain that several weighty authorities were not before that learned judge at all. In cases not depending on the meaning of the word "since" in the Rent Restrictions Acts I must reserve the right of further considering *Raikes* v. *Ogle*. (1)

But the point now before me depends entirely on the Rent Restrictions Acts. The case of *Raikes* v. *Ogle* (1) was decided on December 20, 1920. It has not been challenged until the plaintiffs presented their argument to me here. It has been acted on in a large number of cases in the county court. Here then there is ground for not disturbing it in this the year 1924. But I see further that it was cited by a Divisional Court (Swift and Acton JJ.) without disapprobation in *Schmit* v. *Christy* (2), and in the Divisional Court and in the Court of Appeal in *Michael* v. *Phillips*. (3) I need not refer to the respectful criticism by Mr. Merriman as to the observations of Scrutton L.J. in the latter case, nor formulate the matters for consideration as between outgoing and incoming tenants on the one hand and a tenant who remains in possession under first an old and then a new lease.

Upon the whole I come to the view that for the purpose of this case only and in connection only with the Rent Restrictions Acts I ought to follow the decision in *Raikes* v. *Ogle* (1) as to the meaning of the word "since." It seems to have passed into the accepted views on the Rent Restrictions Acts. I must accordingly hold, on the authority of that decision and under the circumstances only which I have already stated, that the rent here has been increased since March 25, 1920.

If then the rent has been increased since March 25, 1920, what, and this is the third point, is the effect of the Rent Restrictions Act, 1920, on the lease of December, 1920? Apparently the effect is that the lease as a bargain stands save in so far as its provisions are obliterated or modified by the effect of the Act. Hence there is no binding clause here for the contract rental of 120*l*. in the lease. But does

(1) [1921] 1 K. B. 576. (2) [1922] 2 K. B. 60.
(3) [1924] 1 K. B. 16, 27.

it follow that there is no agreement at all for rent? This cannot be the case, for otherwise the Rent Acts would produce a chaos of stultification even deeper than is generally thought. I infer that the agreement for payment of rent stands to the extent allowed by the Act, or in other words the standard rent must here be substituted for the agreed rent. The excess of the latter over the former is not recoverable. That is all: see the wording of s. 1 of the Act.

Ere I deal with the further legal points, let me state briefly the other facts with regard to the Catherine Wheel Hotel. It has always been a tied house, and is so still. In 1899 it was let for twenty-one years to one Dax at a rent of 200*l.* In 1905 Dax surrendered his term and the defendant (who was the outdoor manager to the plaintiffs) took over the premises merely as manager for the plaintiffs. In 1910 the defendant became tenant to plaintiffs on a lease for three years from March 25, 1910, at a rent named in the lease of 75*l.* per annum. The defendant's repairing obligations were very slender. He merely agreed (in substance) to keep the interior of the premises clean, to replace broken glass and to repair fixtures. The "tie" clause provided that the defendant should buy all beer, wine, spirits, etc., from the plaintiffs, and should pay for them at the prices usually charged by the landlords to their tied tenants. The landlords (plaintiffs) agreed (in substance) to keep the exterior and interior in good repair. That was the written agreement. The defendant at the trial alleged that the agreement to pay 75*l.* was colourable only, and that the figure was put in the agreement for the purpose only of being shown to any person who might desire to negotiate for a tenancy of the hotel. The defendant said that the real rent was 60*l.* and that this was the true understanding between the parties and the actual parol and binding agreement. The plaintiffs said that the covenant for the 75*l.* rent was genuine. [His Lordship then held upon the evidence that the rent was 75*l.* and continued:] I have already stated that the rateable value at all material times was 68*l.*

Now the 1910 lease ended in 1913, and trade was depressed

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still. Plaintiffs and defendant discussed terms for a new lease. The defendant wanted a three years' tenancy rent free for the first year, 20*l.* for the second year and 25*l.* for the third year. He also wanted a 10 per cent. discount off all tied prices—except for champagne. The parties could not agree. Meanwhile the defendant stayed in possession pending a new tenancy for defendant or some one else, and he got a 10 per cent. discount off tied prices, and was paying at the rate of 20*l.* a year for his use and occupation. This was the state of things in August, 1914.

In September, 1914, the defendant got a lease for three years from March 25, 1913, at no rent for the first year, 20*l.* for the second year and 25*l.* for the third year. The repairing clauses were in substance the same as in the 1910 lease, and the tie clause was the same except that the defendant was to receive a discount of 10 per cent. on the prices—i.e., he was to pay 10 per cent. less than the prices (except in the case of champagne) usually charged by the plaintiffs to their tied tenants. On December 23, 1915, the first Rent Restrictions Act was passed. On March 16 the 1913 lease expired and defendant remained in possession, paying 25*l.* a year for use and occupation and receiving the 10 per cent. discount. In April, 1917, a new lease for three years was made in substantially similar terms to the 1914 lease. This expired in March, 1920. His rent was none for first year, 20*l.* for second year, 25*l.* for third year, and he got the 10 per cent. discount. On April 2, 1919, another Rent Restrictions Act had come into force. After the expiry of the lease in March, 1920, the defendant remained in possession pending negotiations for a further lease. On July 2, 1920, the existing Rent Restrictions Act was passed. Ultimately the negotiations ended in the lease now in question—namely, that of December 14, 1920. It provides, as I have previously said, for a rent of 120*l.* The term is seven years from March 25, 1920. The "tie" clause is in it, but the defendant does not get the 10 per cent. discount. It expressly provides that the defendant shall keep the interior of the premises in good and tenantable condition.

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Now here I must state the reason for the increase of the rent. In former years the trade of the house had been very small. Thus in 1915 the liquors purchased for the hotel were 680*l.* only, and in 1916 420*l.* only. But the later years are as follow: For 1917, 550*l.*; for 1918, 632*l.*; for 1919, 932*l.*; for 1920, 1600*l.*; for 1921, 1888*l.*; for 1922, 1611*l.*; and for 1923, 1516*l.* Thus there has been a most striking increase, and the house has become a valuable one. Yet this defendant's conduct is as follows. He knew of the pending 1920 Act whilst its intended provisions were being publicly discussed. He knew that the Act was in fact passed in July, 1920. He continued his negotiations with the deliberate intention that when he had got his lease from the plaintiffs, he would repudiate the agreement to pay 120*l.* per annum. His object was to get a lease for seven years, and thus put the plaintiffs in his grip for that period, and then to cut down to the utmost the obligations deliberately embodied in the lease of December 14, 1920. He now seeks not only to cut down the 120*l.* rent, but also to recover a large sum, by counterclaim, from the plaintiffs, because of the fact that the lease does not contain a provision for the 10 per cent. discount. The lease was prepared with great care, and represents the considered bargain of the parties. In my view the defendant shows by his conduct that he is a dishonest man, and I regret that the Rent Restrictions Acts should lend themselves in any way to his purposes. His conduct is discreditable and not that of a respectable business person. On the other hand, the plaintiffs have behaved throughout with fairness and integrity.

Now as to the fourth point, it is this: What is the standard rent? The plaintiffs say 75*l.*—namely, the amount provided by the lease of 1910. It will be observed that the intervening tenancies between the 1910 lease and the present 1920 lease are at a rent less than the rateable value of 68*l.* There are some statutory provisions which I must here cite. The Act of 1920, s. 12, says in the proviso to sub-s. 1: "Where at the date by reference to which the standard rent is calculated the rent was less than the rateable value the rateable value at that date shall be the standard rent."

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Sect. 12, sub-s. 7, says: "Where the rent payable in respect of any tenancy of any dwelling house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling house, and this Act shall apply in respect of such dwelling house as if no such tenancy existed or ever had existed." That proviso and that sub-section follow upon s. 1, which says: "The expression 'standard rent' means the rent at which the dwelling house was let on the 3rd of August, 1914, or, where the dwelling house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling house which was first let after the 3rd day of August, the rent at which it was first let." Now in connection with those provisions I mention the case of *Glossop* v. *Ashley* (1), and I just refer to *Mackworth* v. *Hellard*. (2) The defendant here says that the true 1910 rent was 60*l*., and therefore that the standard rent must be taken as 68*l*.—i.e., the rateable value. I have found against him on the point of fact, and I hold the true rent in 1910 was 75*l*. Thus the rateable value ceases to be relevant as to that 1910 lease. Taking together the provisions I have just cited I think that their net result is to exclude from consideration the intervening tenancies here where the rent was less than two-thirds of 68*l*.—i.e., the rateable value. I accept the argument of Mr. Merriman on the point. I therefore hold that the standard rent of the Catherine Wheel was 75*l*.

The plaintiffs can only recover against the defendant therefore at that rate of 75*l*. That figure is subject to the point hereafter mentioned as to repairs. I must point out that in the present case there is no question of permissible increases under s. 2 of the Act of 1920. The plaintiffs gave no notice of increase. The increase of rent here by the lease of 1920 over the tenancy rent actually payable in August, 1914, had nothing to do with improvements or rates under s. 2.

(1) [1921] 2 K. B. 451; affirmed C. A. [1922] 1 K. B. 1.
(2) [1921] 2 K. B. 755.

I merely refer to my judgment in *Glossop* v. *Ashley* (1) as to increases of rent. I adhere to what I there said, and in substance (apart perhaps from particular dicta of mine) that judgment was confirmed by the Court of Appeal. (1) I do not think that the case of *Dufty* v. *Palmer* (2) touches the present case. Quite apart from other reasons there was in the present case a deliberate agreement by the defendant in December, 1920, to pay the rent of 120*l.*, and that agreement holds save so far as modified by the Act of 1920. In *Dufty* v. *Palmer* (2) there was no assent by the tenant. I am not therefore called on to consider whether I agree with the decision of the Divisional Court in *Dufty* v. *Palmer* (2), or whether that decision be consistent with *Glossop* v. *Ashley* (1) and other cases or with legal principles. So much for the question of standard rent. I have had to deal with complex facts in connection with an almost unintelligible Act of Parliament.

Now the fifth point here is somewhat different. The defendant says, in substance, that from March, 1913, to March, 1920, he was getting a discount on all goods purchased by him from the plaintiffs pursuant to the "tie" clause. This is true. A 10 per cent. discount was in fact allowed him up to March 25, 1920. It then ceased to be allowed. The new lease of December, 1920, continued the "tie" clause, but gave no right to discount. The result is that the defendant had, up to March, 1922, paid to the plaintiffs 291*l.* 9*s.* 2*d.* more in respect of his Catherine Wheel purchases than he would have paid if he had continued to get his 10 per cent. discount. For this sum of 291*l.* 9*s.* 2*d.* (inter alia) the defendant counterclaims. My view as to the defendant's conduct in this as on the other points may be summed up by saying that it is, in my view, a thoroughly dishonest claim. The question, however, is whether it is a claim which, though morally dishonest, is sanctioned by the law. The nature of a "tie" clause viewed generally is indicated very neatly in Mr. Redman's work on Landlord and Tenant, 7th ed. p. 387. I need not even summarize

(1) [1921] 2 K. B. 451; affirmed C. A. [1922] 1 K. B. 1. (2) Ante p. 35.

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the various features of it. Mr. Holman Gregory for the defendant then relies on s. 2, sub-s. 3, of the Act of 1920. In substance that sub-section provides that "any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purpose of this Act, be treated as an alteration of rent, and where as the result of such a transfer the terms on which a dwelling house is held are on the whole less favourable to the tenant than the previous terms the rent shall be deemed to be increased," and so on. Now here (argues defendant's counsel) there has been not only an actual increase in the rent of this hotel by fixing it at 120*l*., but also an increase in the rent, because under the lease of December, 1920, the defendant lost the 10 per cent. discount he previously enjoyed. He then turns to s. 8, sub-s. 1, of the Act of 1920, which says: "A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling house under an agreement made after the 25th day of March 1920, the amount or value thereof shall be recoverable by the person by whom it was made or given." I need not read the proviso, but I may add that sub-s. 2 of s. 8 makes a person "requiring any payment or the giving of any consideration in contravention of the section" liable to a fine of 100*l*.

Before briefly considering the points now to be dealt with, I say, in passing, that these difficulties with regard to hotels and public-houses tend to show that the original Rent Restrictions Acts were never meant to apply to such buildings at all. However, I must face the points before me. To discuss them fully would involve an undue extension of a judgment already laborious enough. I summarize my views. First, I think that it is now settled law that the "tie" must be disregarded for the purposes of the Rent Restrictions Acts. This seems to flow from such decisions as *Westminster*

and General Properties and Investment Co. v. *Simmons* (1); *Isaacs* v. *Titlebaum* (2); *Lawrie* v. *Woods* (3); *Mackworth* v. *Hellard* (4); and *Glossop* v. *Ashley.* (5) If then the tie must be disregarded it would seem to follow that the discount for goods supplied under the tie must also be disregarded. If the tie be collateral only, then the discount is ultra collateral and outside the considerations relevant in the present case. I so hold; and if criticism be directed against the ruling, then I can only reply that I am not responsible for the drafting of the Rent Restrictions Acts. I am caught in the net of sections and decisions.

Even if I be wrong as to the irrelevance of the tie and discount under s. 2, sub-s. 3, I should still hold that s. 8 of the Rent Restrictions Act, 1920, does not refer to such a matter as the present. This cessation of discount was not a "fine, or premium, or other like sum for the grant renewal or continuance of a tenancy." Hence I hold that the counterclaim fails.

If the question of tie and discount be (contrary to my view) relevant under s. 2, sub-s. 3, of the Act then I confess I do not know what is to happen in view of ss. 1 and 14 of the Act. Sect. 14 provides for the recovery by the tenant from the landlord of rent paid above the standard rent, and also enables a tenant to recover the excess from future payments of rent. If the defendant's counterclaim here should (against my opinion) be held to be sound, then, so far as I can see, he will scarcely pay any rent at all for the Catherine Wheel Hotel over the period of seven years. This would be a very odd result.

The next point can be dealt with speedily. It is this. The plaintiff admits that the lease of 1920 contains provisions as to repairs more onerous than those in the earlier lease of 1910. It therefore follows that as to such repairs s. 2, sub-s. 3, applies. Now sub-s. 6 of s. 2 provides that any question arising under sub-ss. 1, 2 and 3 of s. 2 shall be determined

(1) [1919] W. N. 241.
(2) [1920] W. N. 29.
(3) [1920] 2 I. R. 106.
(4) [1921] 2 K. B. 755.
(5) [1921] 2 K. B. 451; affirmed C. A. [1922] 1 K. B. 1.

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on the application of either landlord or tenant by the county court, and that the decision of the court shall be final and conclusive. Apparently the High Court has no jurisdiction to deal with the point: vide the decision of Rowlatt J. in *X-Rays, Ld.* v. *Armitage.* (1)] One or other of the parties here must therefore go to the county court to settle this point of dispute, and I presume that I cannot finally decide the action until the county court judge has given his decision: see *Dun Laoghaire Urban Council* v. *Moran.* (2) I cannot therefore, as yet, give final judgment in this action. I regret that delay will take place through the defendant's contentions, for he has not paid one penny for rent of the Catherine Wheel Hotel since March 25, 1920. I gather from the arguments of the defendant's counsel that it is only on the question of repairs that they desire to dispute the jurisdiction of this Court. The claim is interwoven with the counterclaim. [His Lordship then stated the facts in respect of the Little White Hart Hotel, giving judgment to the same effect as in the case of the Catherine Wheel Hotel and continued:] As to the Little White Hart cottage claim, it must stand over until the county court judge has considered the points arising under s. 2 of the Rent Restrictions Act, 1920. I have now dealt with all the points argued by counsel upon the three sets of premises. I dismiss the counterclaim. Judgment on the plaintiffs' claim must be postponed till the county court judge has considered the matters which the Rent Restrictions Act has thought fit to entrust to his exclusive jurisdiction.

Judgment accordingly.

Solicitors for plaintiffs: *Dodd & Blaker, for Mercer & Blaker, Henley-on-Thames.*

Solicitors for defendant: *Webster & Webster, for Edwin T. Hatt, Reading.*

(1) [1922] W. N. 27.

(2) [1921] 2 I. R. 404.

F. P. F.

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German Reparation Recovery—Goods imported from Germany—Payment of Part of Value to Treasury—Exemption—Goods not first consigned from Germany—Goods subjected to Treatment in Germany—Weasel Skins dressed and cleaned—German Reparation (Recovery) Act, 1921 (11 *Geo.* 5, *c.* 5), *s.* 2; *s.* 3, *sub-s.* 1; *s.* 5, *sub-s.* 1—*German Reparation Recovery* (*No.* 11) *Order*, 1921, *cl.* 2—*German Reparation Recovery* (*No.* 12) *Order*, 1921, *cl.* 2.

The German Reparation (Recovery) Act, 1921, provides:—

Sect. 1: "(1.) Subject to the provisions of this Act . . . . on the importation into the United Kingdom of any German goods to which this Act applies, the importer shall pay to the Commissioners of Customs and Excise . . . . such proportion of the value of the goods, not exceeding fifty per cent., as the Treasury may from time to time prescribe . . . ."

Sect. 2: "The German goods to which this Act applies are goods first consigned from Germany to the United Kingdom, and goods not so consigned being goods wholly or partially manufactured or produced in Germany, unless, in the case of goods partially manufactured or produced in Germany, twenty-five per cent. or more of the value of the goods is attributable to processes of manufacture undergone since the goods last left Germany . . . ."

Sect. 5: "(1.) The Board of Trade may by order—(*a*) . . . . exempt articles of any class, make, or description from the provisions of this Act."

The German Reparation Recovery (No. 11) Order, 1921, made by the Board of Trade under the Act, provides:—

"2. Any article of the following description shall be exempt from the provisions of the said Act, that is to say, any article which is proved to the satisfaction of the Commissioners of Customs and Excise not to have been first consigned from Germany to the United Kingdom."

The German Reparation Recovery (No. 12) Order, 1921, similarly made, provides:—

"2. Any article of the following description shall be exempt from the provisions of the said Act, that is to say, any article in regard to which it is proved to the satisfaction of the Commissioners of Customs and Excise that after being consigned to Germany by a person or persons not resident in Germany it is thence consigned to the United Kingdom, provided that the said Commissioners are satisfied that it has not undergone any process of manufacture in Germany and has not whilst in Germany passed out of the ownership of the person or persons by whom it was consigned thereto."

After the passing of the above Act merchants in New York sold to merchants in London certain raw weasel skins, which were immediately paid for. On the instructions of the buyers, the sellers sent the skins to a firm in Germany to be dressed, and the German firm having dressed them sent them on to the buyers. When the skins arrived at London the Commissioners of Customs and Excise claimed a proportion of their value under the above Act and Orders, but agreed to release them on a bond being given by sureties on behalf of the buyers to the Crown for

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payment of the sum that might be due from the buyers under the Act. A scire facias having issued on behalf of the Crown against the sureties and come on for trial, it was found on the evidence that the process of dressing to which the skins were subjected in Germany, while it fitted them for conversion into garments and other useful articles, made no essential change in their character as weasel skins :—

Held, that the effect of Order (No. 11), apart from the later order, was to limit the Act to goods first consigned from Germany to the United Kingdom and that the goods in question were not goods of that description; that the goods in question came within the description of articles exempt from the Act under Order (No. 12) as being goods which had not undergone any process of manufacture in Germany, and in all other respects; and, consequently, that the goods were not goods to which the Act, as modified by the Orders, applied, that no sum was payable by the buyers to the Commissioners, and that the defendants were not liable upon the bond.

SCIRE FACIAS, tried by Bailhache J., without a jury.

On October 18, 1921, Gustave J. Fuerth & Co., of New York, sold to S. Markham, Ld., of London, 8946 raw weasel skins at 55 cents per skin, or 1249*l.* 10*s.* in all, which was then paid. Under a bill of lading dated October 21, 1921, the sellers, on the instructions of the buyers, shipped the skins to Eisenbach & Stern of Leipzig, in Germany, to be dressed and then sent on to the buyers. Under a bill of lading dated January 18, 1922, the German firm, having dressed the skins at a cost of about 55*l.*, shipped them to the buyers. On January 23, 1922, the skins arrived at the Port of London, and the Commissioners of Customs and Excise then claimed a proportion of the value of the goods under the German Reparation (Recovery) Act, 1921, and the Orders made thereunder; but, as the buyers urgently wanted the goods, the Commissioners agreed to release them on their giving a bond for the amount that might be payable to the Commissioners. A bond dated January 30, 1922, was accordingly executed by J. E. Brown, the secretary of the buyers (therein called "the importer"), and H. T. Fuller (therein called "the surety"), by which they became bound to His Majesty in the sum of 338*l.*, the condition of the bond being that if the said secretary should within thirty days prove to the satisfaction of the Commissioners that the said goods were not goods to which the Act applied, or should within

that time pay the amount payable to the Commissioners under the Act in respect of the goods, then the bond should be void, but otherwise it should remain in force.

On October 26, 1922, a writ of scire facias issued to the obligees in the bond reciting that they had not paid the said sum and commanding them to appear. The plea of the defendants was that they had performed the condition of the bond.

On February 19, 1924, the case was tried before Bailhache J. On behalf of the Commissioners evidence was brought with a view to showing that the process of dressing, including cleaning and bleaching, by which the raw skins were prepared for being made into garments, was a process of manufacture which altered the nature of the skins. On behalf of the defendants evidence was brought to show that the process of dressing the skins did not alter their original character. The effect of the evidence is fully stated in the judgment of Bailhache J., now reported.

Sir H. H. Slesser S.-G. (*W. Bowstead* with him) for the Crown. The defendants are liable upon the bond, inasmuch as they have failed to comply with its condition by proving to the satisfaction of the Commissioners that the skins in question are not goods to which the German Reparation (Recovery) Act, 1921 (1), applies. The skins are goods to which the Act as modified by the Orders applies. Even assuming that the effect of Order (No. 11) (1) is to limit s. 2 of the Act to "German . . . . goods first consigned from Germany to the United Kingdom," these skins are within the Act. The evidence shows that the processes to which the skins were subjected in Germany entirely altered their character, so that in their finished state they were German goods first consigned not from the United States but from Germany. Further, the skins are not exempt from the Act under Order (No. 12) (1), because they are not goods which have not undergone any process of manufacture in Germany. The evidence at least shows that they were subjected to a process of dressing

(1) The material provisions of the Act and of the Orders are set out in the headnote.

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in Germany which changed them from raw skins into skins capable of being used in making garments, and they therefore underwent a process of manufacture in Germany. The object of Order (No. 12) was to exempt from duty goods sent from the United Kingdom or elsewhere to Germany for sale there, but unsold there and sent back to the United Kingdom. At all events duty should be paid upon the value of the work done upon the skins in Germany.

Sir H. Maddocks K.C. (*G. W. H. Jones* with him) for the defendants. The defendants are not liable upon the bond, as they have complied with its condition by showing that the skins in question are not goods to which the Act of 1921 and the Orders thereunder apply.

The skins are not goods to which the Act apart from the Orders applies. The Act, as appears from the preamble and ss. 1 and 2, applies only to German goods. Sect. 2 provides that the German goods to which the Act applies are either "goods first consigned from Germany to the United Kingdom" or "goods not so consigned being goods wholly or partially manufactured or produced in Germany" unless in the case of the latter goods 25 per cent. or more of the value is attributable to processes of manufacture since the goods left Germany. The skins in question are not within the first of these classes of goods, because they were not first consigned from Germany, but from the United States, to the United Kingdom. The skins were first consigned from the United States, and the evidence shows that the processes to which they were subjected in Germany did not convert them into German goods or goods which could be said to have been first consigned from Germany: see *Union Bank of London* v. *Lenanton*. (1) Neither are the skins within the second branch of that section, which is applicable only to German goods transmitted to the United Kingdom through some other country where 25 per cent. has been added to their value. Sect. 3 provides for the ascertainment of the value of the imported goods, and it has a proviso the meaning of which is not very clear, as it appears to relate to

(1) (1878) 3 C. P. D. 243.

goods exported from the United Kingdom to Germany, and therefore to be inconsistent with the previous sections, which regard the Act as applying only to German goods. If that proviso applies to these goods, duty could only be charged thereunder upon the value of the work done upon them in Germany. It is submitted however that s. 5 has no application to this case. The Act should be strictly construed, as it tends to restrict the freedom of trade.

As to the Orders, Order (No. 11) (1) in effect repeals the second part of s. 2, and leaves only the first part, which clearly does not apply to these goods. Order (No. 12) (1) cannot easily be understood, but would seem to be a repetition of the second part of s. 2. At all events, if in the absence of that Order these goods came within the Act, that Order would exempt them from it.

BAILHACHE J. This case raises a question as to the construction of the German Reparation (Recovery) Act, 1921, and of two Orders made under that Act.

The facts of the case are simple. Messrs. Markham, Ld., of London, bought from dealers in the United States a quantity of weasel skins upon the terms that they should be sent from the United States to Germany to be dressed, and that having been dressed they should be forwarded from the dresser in Germany to the United Kingdom. The arrangement as to the transit from the United States to the United Kingdom was one complete arrangement; that is to say, it was arranged ab initio that there should be a transit to Germany, and a subsequent transit, not the subject matter of any new contract, from Germany to this country. When the skins arrived at this country the Commissioners of Customs and Excise required payment of a proportion of their value under the Act of 1921. The importers questioned their liability to make the payment. A bond was therefore taken from their secretary and another person as surety, and upon that bond these persons are now being sued.

The question is whether the importers are liable to make the payment required by the Commissioners. The answer

(1) See note (1) ante, p. 105.

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depends upon the construction of the Act and the said two Orders made under it, and seems to me to be by no means easy. It is to be observed generally that the Act is entitled an Act to provide for the application of part of the purchase price of imported German goods towards the discharge of the obligations of Germany; and that its provisions emphasize the fact that it is dealing with German goods. The object of the Act was no doubt in part to raise money towards payment of the reparations due to this country from Germany, but I agree with the Solicitor-General that in all probability its object was also in part to discourage the sending of goods to Germany to be subjected to processes of manufacture, in order that work might be kept in this country to be done by its own people.

Sect. 2 (1) of the Act provides that the German goods to which the Act applies are "goods first consigned from Germany to the United Kingdom." Pausing there for the moment, I understand that to mean German goods which are the subject matter of a contract under which they come originally from Germany to the United Kingdom, their transit from Germany to this country being a new transit; and not to mean goods which are the subject matter of an inclusive contract from some other country of origin viâ Germany to this country, the transit from Germany to this country being the continuation of the transit from that other country. If that is the right construction of these words, it is clear that these goods do not come within them, because they were first consigned not from Germany but from the United States to this country. It is true that they were consigned through Germany, but they were not first consigned from Germany. If the section ended there I do not think there would be any doubt that it did not apply to these goods.

The section, however, goes on to say "and goods not so consigned being goods wholly or partially manufactured or produced in Germany," and it is also necessary to consider whether these words apply in this case. The weasel skins in

(1) See note (1) ante, p. 105.

question were sent from the United States to Germany in their natural state, that is to say, as they were taken off the animals. In Germany they were subjected to a process of dressing or treatment in order to fit them for manufacture into garments or muffs for ladies, or into ornamental articles of one kind or another. The process has been described to me. It consists first in taking away from the pelts any excess thickness or irregularity, then in softening them, and then in passing them over a knife with a view to further refinement. In the course of the process some chemicals are occasionally added. The whole object is to reduce the thickness of the leather considerably, so that it may be rendered pliable and capable of being easily worked and manufactured into the articles which I have mentioned. There can, I think, be no doubt that the process caused no radical change in the character of the skin. It was a weasel skin when it left the United States : it was a weasel skin when it arrived in the United Kingdom. It has been suggested that the skin sometimes changes its name, and having started its transit as a weasel, it ends it as an ermine, but as a matter of fact however its name may change the thing itself does not alter in character. Its treatment is very different from that of certain other goods which are imported into Germany for manufacture and completely alter their character. For instance, when iron ore is imported from Spain or elsewhere into Germany for manufacture, nobody could contend that the pig-iron which is the result of the manufacture was the same thing as the iron ore. It has been subjected to a complete process of manufacture. To my mind it is very doubtful whether the process which the skins undergo in Germany can be called a process of manufacture. I should have thought that it would more accurately be described as a process of treatment. The words in the section are " manufactured or produced." The skins were clearly not produced in Germany, and I doubt whether the treatment which they underwent there brings them within the word " manufactured." If this conclusion is right, the skins are not within s. 2 of the Act.

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The matter is further complicated, however, by Orders made by the Board of Trade under the Act. Order (No. 11), 1921 (1), exempts from the provisions of the Act "any article which is proved to the satisfaction of the Commissioners of Customs and Excise not to have been first consigned from Germany to the United Kingdom." If that were the only Order, and if it had to be read in connection with s. 2 of the Act, I should say that the effect was to strike out of the section the second set of words to which I have referred, and to make the section say only: "The German goods to which this Act applies are goods first consigned from Germany to the United Kingdom." That seems to me to be the plain effect of Order (No. 11). If the matter stood there I should have thought it was fairly plain that the combined effect of s. 2 of the Act and Order (No. 11) was to confine the duty payable to goods first consigned from Germany to the United Kingdom, and for the reasons which I have given I do not think these goods were first consigned from Germany to the United Kingdom. I therefore think that if these were the only provisions the goods in question would not come within the Act.

There are also other provisions which require to be considered. Sect. 3 of the Act contains a proviso which is intended to be in favour of persons carrying on business in the United Kingdom by creating an exception in their favour in respect of goods sent by them to Germany for the purpose of undergoing some process there and afterwards brought back to them in the United Kingdom. It is true that under the section the persons so receiving back the goods are liable to some duty, but the duty is to be calculated upon the added value to the goods of the work done upon them in Germany, and these persons are thus relieved to the extent of being charged a duty much lighter than the very heavy duty otherwise chargeable on goods coming within s. 2, which is calculated upon the total sale value of the goods in this country. Sect. 3 has no application to this case, because it is confined to goods sent from the United Kingdom to

(1) See note (1) ante, p. 105.

Germany for treatment and afterwards brought back into the United Kingdom.

There is, however, another Order—namely, Order (No. 12), 1921 (1)—the construction of which has caused me a good deal of trouble, but which I think on consideration applies almost in terms to this particular case, and therefore exempts these goods from the provisions of the Act. [His Lordship read cl. 2 of that Order (1) and continued :] The goods in question were consigned to Germany as a sort of half-way house by persons not resident in Germany, that is to say by the buyers in the United Kingdom acting through the sellers in the United States as their agents, and they were thence consigned to the buyers in the United Kingdom, and whilst in Germany the goods still remained in the ownership of the same persons, who I take it were the consignees in this country, and, further, the goods being in the hands of the dressers in Leipzig merely for the purpose of treatment in the way I have described, did not undergo any process of manufacture in Germany. That Order, therefore, seems to cover this case almost in terms.

On the whole I think that the effect of s. 2 of the Act and Order (No. 11) taken together is to confine the Act to goods first consigned from Germany to the United Kingdom, at any rate in regard to the whole duty payable in respect of the saleable value of the goods in this country, as distinguished from the duty payable in respect of the value of the work done to the goods in Germany. Though I have found Order (No. 12) somewhat puzzling, I now think that that Order also exempts the goods in question from s. 2 of the Act

The conclusion at which I have arrived is that these goods are exempt from the duty claimed, and therefore that the defendants are not liable upon the bond.

Judgment for defendants.

Solicitor for Crown : *The Solicitor for Customs and Excise.*
Solicitors for defendants : *Pakeman, Son & Read.*

J. R.

(1) See note (1) ante, p. 105.

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1924
Feb. 20.

[IN THE COURT OF APPEAL.]

PULLING *v.* LIDBETTER, LIMITED.

Feeding Stuffs—Bakery Sweepings—Sale of, as Food for Cattle—Warranty of Fitness—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-ss.* 2, 3 *and* 4.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, certain obligations are imposed upon a person who sells for use as food for cattle or poultry "any article which has been artificially prepared."

By sub-s. 3 a certain warranty is implied on a sale for a similar purpose of "any article sold . . . . under a name or description implying that it is prepared from any particular substance . . . . or is the product of any particular seed."

By sub-s. 4: "On the sale of any article for use as food for cattle or poultry there shall be implied a warranty by the seller that the article is suitable to be used as such":—

Held, affirming the judgment below, that the words "any article" in sub-s. 4 are to be read in their natural sense and not as limited to the kinds of articles dealt with in the two preceding sub-sections.

Appeal from a Divisional Court. (1)

The action was brought in the Brighton County Court to recover damages for the loss of four pigs, alleged to have died as the result of being fed on food sold to the plaintiff by the defendants, who were bakers, carrying on business in Brighton. The facts were that in September, 1922, the plaintiff, a pig keeper, saw the defendants' managing director, who offered the bakery sweepings to the plaintiff as pig food at 2*s.* 6*d.* a bag. The plaintiff agreed, and sent to Brighton for them every fortnight from that time until January, 1923, taking sometimes two and sometimes three bags. The sweepings consisted of the ingredients used in making bread, together with dust and dirt and other odds and ends. The plaintiff fed five pigs with this food throughout these four months, but in January, 1923, the pigs became ill and four of them died.

The county court judge found that the pigs died from salt poisoning caused by their eating the bakery sweepings, which contained an excessive proportion of salt; and that

(1) Reported [1924] 1 K. B. 317.

the defendants through their managing director offered and sold the sweepings to the plaintiff for the purpose of being used as pig food. Upon these findings he held that no warranty was implied by virtue of the Sale of Goods Act, 1893, s. 14, sub-s. 1, and that the plaintiff could not succeed under that Act, there being no evidence that the plaintiff relied on the defendants' skill or judgment. He held, however, that the sweepings were an article sold "for use as food for cattle," and that the defendants had committed a breach of warranty implied on such sale by s. 1, sub-s. 4, of the Fertilisers and Feeding Stuffs Act, 1906 (1), and he assessed the damages at 20*l.*

On appeal the Divisional Court (Sankey and Talbot JJ.) affirmed the decision of the county court judge.

The defendants appealed to the Court of Appeal.

Flowers for the appellants. In such a case as the present, apart from sub-s. 4, no warranty could possibly be implied that the article sold was fit for use as food for pigs. Bakers

(1) Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 2: "Every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating the name of the article, and whether it has been prepared from one substance or seed or from more than one substance or seed, and in the case of any article artificially prepared otherwise than by being mixed, broken, ground or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article, and the invoice shall have effect as a warranty by the seller as to the facts so stated, except that as respects percentages the invoice shall have effect as a warranty only that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

Sub-s. 3: "Where any article sold for use as food for cattle or poultry is sold under a name or description implying that it is prepared from any particular substance or from any two or more particular substances, or the product of any particular seed or of any two or more particular seeds, and without indication that it is mixed or compounded with any other substance or seed, there shall be implied a warranty by the seller that it is pure, that is to say, is prepared from that substance or those substances only, or is a product of that seed or those seeds only."

Sub-s. 4: "On the sale of any article for use as food for cattle or poultry, there shall be implied a warranty by the seller that the article is suitable to be used as such."

Sect. 10: "For the purposes of this Act the expression 'cattle' shall mean . . . . swine."

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would presumably know nothing about such a question, and the purchasers, who would be much better judges whether bakery sweepings were a proper article to feed their pigs on, would know perfectly well that the sellers had no intention of giving such a warranty. That being so some limitation must be put upon the words "any article" in sub-s. 4. The Act in which it occurs deals with "feeding stuffs," which would be an inappropriate term to apply to the refuse of a bakery. What was meant by that term is indicated by the two preceding sub-sections—namely, articles artificially prepared, and articles sold under a name or description implying that they are prepared from particular substances or are the product of particular seeds, but nothing else.

Merlin for the respondent was not called upon.

BANKES L.J. This is a plain case, and I think the Act is partly aimed at the very kind of transaction that the evidence shows to have taken place in this case. The defendants are bakers, and in the course of their business they accumulate the sweepings of the bakery, and it appears that in bakery sweepings there is always a certain amount of salt, which is known to be very dangerous to pigs, and in anything but very small quantities is likely to be fatal. The managing director of the defendants offered a quantity of these sweepings for sale to the plaintiff, who is a working man, and no doubt well acquainted with the management of pigs, but presumably knows nothing about the constituents of bakery sweepings. Probably the defendant's manager did not know that they would be dangerous to pigs if they contained more than a certain percentage of salt, because, by way of a recommendation of the stuff as food for pigs, he said to the plaintiff, "If I had pigs I should not sell the stuff at all, I should give it to my own pigs; as I have not any pigs you may have it." The county court judge has found as a fact that the defendants sold the sweepings as an article to be used as food for pigs. He has held, although some people might have taken a different view on the point, that he did

not impliedly give a warranty under the Sale of Goods Act, but he held that a warranty was to be implied under s. 1, sub-s. 4, of the Fertilisers and Feeding Stuffs Act, 1906. Sub-s. 2 of that section deals with food which has been artificially prepared and makes certain provisions for the protection of purchasers; while sub-s. 3 deals with the sale of feeding stuff under a description implying that it is prepared from a particular substance. Then sub-s. 4 provides quite generally that "On the sale of any article for use as food for cattle or poultry there shall be implied a warranty by the seller that the article is suitable to be used as such." That seems to be a very reasonable provision covering every article sold for the purpose mentioned, because if a person has an article which he considers may be suitable as food for cattle, and sells it for use as such, but does not wish to be taken as giving a warranty of its fitness for that purpose, he ought to make a special contract to that effect, but in the absence of such contract it is perfectly reasonable that he should be understood as so warranting. For on whom ought the risk of unfitness to fall? On the purchaser who has presumably no means of knowing what the article he is buying consists of, or the seller who knows or ought to know what the constituents of the article are? I think it clearly ought to fall on the latter. The appeal must be dismissed.

SCRUTTON L.J. The appellants have on the findings of the county court judge sold the sweepings of their bakery as food for pigs, with the result that unfortunately the pigs have died. The county court judge has taken the view that in the circumstances there was no implied warranty under s. 14 of the Sale of Goods Act. It is not necessary to express an opinion whether he was right in that or not. But he has decided that the case came within s. 1, sub-s. 4, of the Fertilisers and Feeding Stuffs Act, 1906, which says that: "On the sale of any article for use as food for cattle or poultry there shall be implied a warranty by the seller that the article is suitable to be used as such." Those words taken by themselves are plainly wide enough to cover this

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Scrutton L.J.

sale. The sweepings were sold "for use as food for cattle," which term by the definition clause, s. 10, includes "swine." I have listened with attention to an argument directed to the necessity of limiting the general words "on the sale of any article" by reference to the preceding sub-sections, but I can find no sufficient reason for so limiting them. The words are not "on the sale of any *such* article," but "on the sale of any article." I am unable to see that any unfortunate results will follow from this decision, for the vendors' remedy is simple. If they sell their sweepings as food for cattle and wish to exclude the operation of sub-s. 4 they ought to say in express terms at the time of the sale that they do not know precisely what the sweepings may contain, and give no warranty that they are fit for any particular purpose, and that the purchaser will use them as food for cattle at his own risk. I think that the appeal fails.

SARGANT L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitors for the appellants: *Graham-Hooper & Betteridge, Brighton.*

Solicitors for the respondent: *Griffith, Smith, Wade & Riley.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1924
Feb. 29.

COCKBURN AND ANOTHER *v.* SMITH AND OTHERS.

[1922. C. 2123.]

Landlord and Tenant—Flat—Roof—Possession of Landlord—Liability to Repair—Negligence—Reasonable Care.

The owner of a block of flats let one of the top flats to a tenant, but kept the roof of the building and the guttering appurtenant thereto in his own possession and control. The guttering became defective, and rainwater which should have been carried away escaped and flowed upon the wall of the tenant's flat and made the flat so damp that the tenant suffered injury to her health and sustained damage. The landlord had notice of the defect, but was dilatory and negligent in remedying it. In an action by the tenant against the landlord:—

Held, that the defendant was under an obligation to take reasonable care to remedy defects in the roof and guttering of which he had notice and which were a source of damage to the plaintiff; and that even if this duty was purely contractual it was not modified or excluded by the fact that the landlord had expressly agreed in the contract of tenancy to keep the staircases, passages, and landings in good repair.

Hart v. *Rogers* [1916] 1 K. B. 646 is no longer an authority that a landlord who lets a flat and retains the roof is under an absolute obligation to repair the roof.

Judgment of Greer J. reversed.

APPEAL from the judgment of Greer J. in an action tried before the learned judge without a jury.

The plaintiffs were Gertrude Harriet the wife of James Andrew Cockburn (herein called the elder plaintiff) and Dorothy Gertrude Cockburn, an infant suing by the elder plaintiff her mother and next friend.

On September 13, 1915, the elder plaintiff entered into an agreement in writing whereby she became tenant to the then owners of a flat, No. 16 Prebend Mansions, Chiswick, for a year certain. She continued to occupy the flat from year to year till March 23, 1920, on which date she became a quarterly tenant at an increased rent. On December 31, 1920, the defendants became lessees of Prebend Mansions for 81½ years less three days from December 25, 1917, and owners of the reversion on the tenancy of the elder plaintiff, who in

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March, 1921, attorned tenant to the defendants by paying her rent to them through their agents Messrs. Essam.

By the agreement of September 13, 1915, the landlords agreed to let "All that suite of rooms known as No. 16 Prebend Mansions, High Road, Chiswick . . . . together with coal bunker No. 16 in the building of which the premises form part." The tenant agreed, among other things, not to allow persons or children under her control to loiter in the entrance hall or passages or on the landings or stairs of the building, and not to suffer the entrance hall passages landings or stairs to be littered, but to use them only for the purpose of ingress egress and regress and not to leave or suffer to be left any obstacle in or upon them. She also agreed to keep the water closets bath lavatory basins sink cisterns and all waste and other pipes connected with the premises clean and open and in proper repair and to be responsible for all damage occasioned to the premises and the other parts of the building through improper use or the bursting overflowing or stopping up of the said waterclosets bath lavatory basins sink cisterns and water pipes; and to keep all flues and chimneys regularly swept, restore broken windows and make good all other damages to the premises caused by her or her servants; and to deliver up the premises at the expiration of the tenancy in as good order and condition as the same were in at the date of the agreement.

The agreement contained these further clauses:—

"12. Subject to the tenant duly and punctually paying the said rent and observing and fulfilling all the agreements on her part herein contained the landlords will keep the entrance hall staircases passages and landings sufficiently lighted and in good repair and will pay all rates taxes and charges (including water rate but excluding the gas and electric rate) payable in respect of the said premises.

"13. The landlords shall not be responsible for any losses or injuries arising from . . . . the negligence of any of the other tenants of the building or the negligence or misfeasance of any of the landlords' servants." Clause 14 contained a proviso for re-entry, and proceeded: "But so long as the

tenant continues to observe and perform the agreements and conditions herein contained and on the tenant's part to be observed and performed the tenant may quietly hold and enjoy the premises during the said term without any lawful interruption by the landlords or any person claiming through under or in trust for the landlords."

The flat was situated on the top floor of Prebend Mansions. It consisted of a dining room in front, a bedroom behind it, a kitchen and offices behind that, then a small bedroom, and the elder plaintiff's bedroom at the back. In June, 1921, considerable signs of damp appeared in this bedroom. When paying the June rent the elder plaintiff gave notice by letter to Messrs. Essam of what had occurred, but no steps were then taken by the defendants or their agents to ascertain the cause of the damp. In October, 1921, there was an escape of water from a gutter in the angle between the plaintiffs' flat and the next block where the wall of the plaintiffs' dining room adjoined the wall of the flat horizontally adjacent. This caused very serious damage to the wall of the dining room and that of the adjoining bedroom where the plaintiffs were then sleeping. The water escaped because the stop-end of the gutter had become corroded and had fallen out, so that rainwater from the roof instead of passing down the outlet pipe fell upon the wall of the dining room, which became so badly wetted that the damp spread to the wall of the bedroom. There was also a fresh outbreak of damp in the back bedroom caused by the gutter along the roof becoming partially choked with mud, or being insufficient for its purpose.

When the damp appeared in October the elder plaintiff telephoned to the office of the defendants' agents stating what had occurred. The message was received by a girl who said she would tell Mr. Essam when he came in. Greer J. inferred that she had done so from the fact that Mr. Essam was not called at the trial. In the first week in November the elder plaintiff wrote to the defendants' agents repeating what she had said on the telephone, but the letter was not produced and she gave verbal evidence of its contents. The defendants did nothing. The plaintiffs continued in occupation.

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By December 5 the elder plaintiff found herself suffering from severe rheumatism. About December 13 the defendants' agent visited the flat, and on January 2 a builder named Vigors commenced work on the roof and gutters of Prebend Mansions. The stop-end of the gutter between the two blocks of buildings was replaced in the first week in January, but the gutter which ran along the roof above the plaintiffs' flat was not cleaned out till the end of January or the beginning of February. About the middle of March the younger plaintiff also was found to be suffering from rheumatism. The learned judge found that the illness from which the plaintiffs suffered was due to the damp surroundings in which they lived after the walls had become saturated in October; but that it was not reasonable for them to remain there as long as they did, and that if the elder plaintiff had acted reasonably she would have obtained accommodation elsewhere and would thereby have lessened the damage she suffered and probably have avoided the damage suffered by the younger plaintiff.

The plaintiffs in their statement of claim alleged (para. 4) that by the agreement of tenancy the defendants impliedly promised to keep the outside of the flat together with the roof and guttering and gutter pipes leading therefrom in good repair and condition during the tenancy and that they retained the outside of the premises and the roof and guttering and gutter pipes under their control.

Greer J. after referring to *Miller* v. *Hancock* (1); *Hargroves & Co.* v. *Hartopp* (2); *Dobson* v. *Horsley* (3); *Hart* v. *Rogers* (4) and *Dunster* v. *Hollis* (5) continued:

"Whatever may be the case as regards the staircases and other places to which the tenant has a right of access, it seems to me that with regard to the repair of the roof the tenant's only rights are such as he may have by contract express or implied. The obligation if any to keep the roof in repair, or to take reasonable steps to see that it is safe, is an

(1) [1893] 2 Q. B. 177.
(2) [1905] 1 K. B. 472.
(3) [1915] 1 K. B. 634.
(4) [1916] 1 K. B. 646.
(5) [1918] 2 K. B. 795.

obligation which arises out of contract, and not otherwise. In *Hargroves & Co.* v. *Hartopp* (1) there was no express covenant by the defendants to repair the roof or gutters or any part of the premises which remained under the control of the landlord. Neither was there in *Hart* v. *Rogers* (2) any express agreement by the landlord to keep in repair any portion of the premises which remained under his control. The same applies to *Dunster* v. *Hollis*. (3) In the present case there is an express term in the tenancy agreement dealing with the landlord's obligations with reference to parts of the premises not included in the tenancy. [The learned judge read cl. 12 of the agreement, and continued :] It seems impossible to read into a tenancy agreement which contains a clause like that an implied promise to keep the roof in repair. I read cl. 12 in this light : The parties must be taken to have directed their minds to the question what obligations the landlords were to undertake in reference to those parts of the premises of which they retained control, and to have decided that the tenant should rest content with the express undertaking given in cl. 12. In my opinion the maxim 'Expressum facit cessare tacitum' applies to this case, and there is no implied contract that the defendants should keep the roof and gutters in repair, or that they would take reasonable care to keep the same in a reasonably safe condition. A consideration of the principles laid down by Bowen L.J. in *The Moorcock* (4) and by Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* (5) leads to the same result. I cannot say that in this case both parties to the agreement must have intended that the landlords should keep the roof and gutters in repair or exercise reasonable care to keep them safe. I think they intended that the landlord's obligation to keep in repair the parts of the premises not included in the tenancy agreement should be confined to their express undertaking in the agreement. I also think there was no duty towards the tenant apart from the agreement. I do not find that it has ever

(1) [1905] 1 K. B. 472.
(2) [1916] 1 K. B. 646.
(3) [1918] 2 K. B. 795.
(4) (1889) 14 P. D. 64.
(5) [1891] 2 Q. B. 488.

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been held that any such duty exists apart from contract. It does not seem to me possible to say that where parties regulate their relationship to one another by contract the law imposes on one of them an additional obligation which he might have refused to undertake by contract if he had been asked to do so. It may be useful to add that if the landlords were, contrary to my view, under an obligation to the elder plaintiff to take reasonable care to keep the roof in a reasonably safe condition, I find as a fact that they did not do so, and that the elder plaintiff suffered damage in consequence, which acting as a jury I estimate at 205*l*.

As the authorities stand the younger plaintiff is not entitled to recover: *Cavalier* v. *Pope* (1); *Ryall* v. *Kidwell & Son.* (2) In the view I take it is unnecessary to decide whether the defendants are protected by cl. 13 of the contract of tenancy. There must be judgment for the defendants."

The elder plaintiff appealed.

Holman Gregory K.C. and *S. H. Lamb* for the appellant. The learned judge was wrong in holding that, apart from contract, a landlord who lets part of a house to a tenant and retains other part in his own possession owes no duty towards the tenant to keep the retained portion from being a source of damage or danger to the demised portion. It seems to be assumed that because a duty of some kind—whether to insure the tenant, or to take reasonable care to protect him, from damage—may be based upon an implied contract, therefore it cannot exist apart from an implied contract. But that assumption, if it exists, is erroneous. The law of itself, apart from any contract, imposes certain reciprocal obligations on persons who stand to each other in certain relations, by the mere fact of the relation. The relation of bailor and bailee for hire may be said to imply a contract by the bailee to take reasonable care of the thing bailed, but the law imposed the same duty. For breach of the duty an action of tort and an action on the implied contract are alternative remedies, but the more primitive and original

(1) [1906] A. C. 428. (2) [1914] 3 K. B. 135.

remedy was by an action of tort. Similarly the relation of a surgeon to his patient imposes a duty on the surgeon to exercise care and skill. The relation of master and servant imposes certain duties on the master, and the relation of landlord and tenant is quite sufficient to impose on the landlord, who retains property adjacent to the demised premises, the duty to take care that the retained premises do not become a source of damage to the demised premises: *Hargroves & Co.* v. *Hartopp.* (1)

It is perhaps too late now to contend that the duty of the landlord is to insure the tenant against damage. This was held to be his duty in *Hart* v. *Rogers* (2), a case, like this, of a leaking roof. But that case has lost the support of *Miller* v. *Hancock* (3) on which it was based, and which after having been criticized in *Huggett* v. *Miers* (4) and questioned in *Dobson* v. *Horsley* (5) was finally overruled in *Fairman* v. *Perpetual Investment Building Society.* (6) In *Miller* v. *Hancock* (3) the plaintiff, a person coming on business to the tenant of a flat, sued the landlord for injury sustained through a defective approach to the flat. It may be conceded that too high a duty was imposed on the landlord in that case—namely, a duty to keep the staircase in a reasonably safe condition—and that he was not bound to do more than take reasonable care that invitees of the tenant should not suffer from the condition of the staircase. But *Hart* v. *Rogers* (2) may yet be law although *Miller* v. *Hancock* (3) is overruled, for the duty to keep a common staircase in repair may well be less exigent than a duty to keep the roof of the building in repair. A defective approach renders the top flat less commodious; a defective roof makes it uninhabitable.

But assuming that the respondents are not bound absolutely to keep the roof and guttering in repair, they are at least bound to use reasonable care and diligence to remedy defects of which they have notice: *Carstairs* v. *Taylor* (7);

(1) [1905] 1 K. B. 472.
(2) [1916] 1 K. B. 646.
(3) [1893] 2 Q. B. 177.
(4) [1908] 2 K. B. 278.
(5) [1915] 1 K. B. 634.
(6) [1923] A. C. 74.
(7) (1871) L. R. 6 Ex. 217.

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Ross v. *Fedden*. (1) In *Gill* v. *Edouin* (2) Wright J. enumerates four exceptions to the rule in *Rylands* v. *Fletcher* (3) that a person who for his own purposes stores water in unnatural quantity upon his land, must keep it within bounds at his peril. "A fourth exception," said Wright J., "has been made in *Ross* v. *Fedden* (1), where the plaintiff had taken a floor in a house, and it was held that he took the premises as they were and subject to the ordinary risks arising from the use of the rest of the house as it stood, and consequently could not recover against the occupier of an upper floor for damage done by water escaping from a closet on the defendant's floor, there being no negligence on the defendant's part." That implies that the defendant owed a duty to take reasonable care. *Blake* v. *Woolf* (4) is to the same effect. This is plainly a duty imposed by law apart from any contract between the parties, and is not less a legal duty because it may also be charged as upon an implied contract. Being a legal duty, it is unaffected by the fact that the respondents expressly contracted to keep the passages and staircases in good repair. They committed a breach of this duty on receiving notice of the defect in October, 1921, and doing nothing until February, 1922, to remedy it.

But even assuming, as the learned judge has held, that the duty to take reasonable care was a purely contractual duty, an implied contract with regard to the roof is not affected by an express contract with regard to the staircase. The learned judge has reached the conclusion that the one excludes the other through a misapplication of the maxim Expressum facit cessare tacitum. The respondents' express obligation to keep the staircase in repair would supersede any implied obligation to the same effect, but to infer from an express obligation to keep in repair the staircase, the use of which is among the demised premises, an intention to exclude an implied obligation concerning the roof, which was no part of the demise

(1) (1872) L. R. 7 Q. B. 661. affirmed 72 L. T. 579.
(2) (1895) 71 L. T. 762, 763; (3) (1868) L. R. 3 H. L. 330.
(4) [1898] 2 Q. B. 426.

and is nowhere mentioned in the agreement, is to infer more than the facts imply.

Sir H. Maddocks K.C. and *B. L. O'Malley* for the respondents. There was no obligation upon the respondents to repair the roof. As a lease of rooms on a floor includes a lease of the outer wall: *Carlisle Café Co.* v. *Muse* (1), so a lease of a top flat includes a lease of the roof. At the least the appellant acquired a right to the use of the roof, a right in the nature of an easement. "It is well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and that he may enter on the land of the owner of the servient tenement for that purpose": *Colebeck* v. *Girdlers' Co.* (2), per Mellor J., citing *Pomfret* v. *Ricroft* (3), where Rainsford J. in the Court of King's Bench held that "if a man demise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor." This opinion of Rainsford J. is really the contention of the appellant; but the judgment of the King's Bench "was reversed in the Exchequer Chamber by Vaughan C.J. of the Bench, Hale C. B., Turner, Archer, Wyld and Littleton, una voce." Therefore, whether the demise included the roof or there was an implied grant of an easement, it was for the appellant to repair defects in the guttering, and not for the respondents.

If any obligation is imposed on the respondents it is at the highest an obligation to use reasonable care. This obligation is discharged by employing a competent builder to do the necessary repairs: *Blake* v. *Woolf* (4) referred to with approval in *Rickards* v. *Lothian* (5); and this the respondents have done.

Counsel for the appellant were not called upon in reply.

BANKES L.J. The appellant took a flat from the respondents. She complains of injury to her health by reason of water

(1) (1897) 67 L. J. (Ch.) 53.
(2) (1876) 1 Q. B. D. 234, 243.
(3) (1670) 1 Saund. 321.
(4) [1898] 2 Q. B. 426.
(5) [1913] A. C. 263, 280.

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penetrating the walls of her flat through breach of duty of the respondents, her landlords. Greer J. has held that the respondents were under no liability, although he was of opinion that they and their servants or agents were negligent in not having attended to the defective gutter between the wall of the appellant's flat and the wall of the adjoining premises. In case he should be wrong in his decision on the question of liability he awarded 205*l.* as the damages suffered by the appellant.

I want to make it plain at the outset that this is not a letting of the whole house where, without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises whether the required repairs were structural or internal and whether they had or had not notice of the want of repair.

In the present case the appellant took only part of the building ; the top flat, part of a building in flats. What she took is quite clear from the words of the agreement of tenancy. It was a suite of rooms, No. 16 Prebend Mansions together with coal bunker No. 16 in the building of which the premises formed part. The contention that because the rooms include the walls therefore they include the roof also is one which I cannot assent to. On the construction of this document, and assuming that there were other tenants holding on similar terms, it is clear that the respondents did not demise the roof to any one but kept it in their own control entirely, and therefore it does not make much difference whether we are considering the roof of the appellant's flat or the roof of the adjoining flat, which I assume was occupied by another tenant on similar terms, and the roof of which was also retained by the respondents in their own occupation and control. The trouble arose from a defect in the guttering in the roof of the building which contained the appellant's flat and the adjoining flat, where the two buildings join. A down spout takes water from the roof of the building, but the guttering became defective and choked from want of cleansing ; and water thus escaped and penetrated the wall of the appellant's flat and made it so damp that her health was seriously affected.

In these circumstances the question is what duty the landlords owed to the plaintiff in relation to this defective guttering. It cannot now be suggested that there was any agreement express or implied which can accurately be described as an agreement to repair the roof or the guttering; but there is a line of authorities to show that a landlord is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the parts demised to others. In some of these authorities it was not necessary to decide the point expressly, because in the opinion of the Court there was no want of reasonable care; but three of these cases indicate that if it had been necessary to define the duty of the defendant it would have been defined in the terms I have suggested. In *Carstairs* v. *Taylor* (1), where a rat made a hole in a rainwater cistern on an upper floor occupied by the defendant who had let the lower floor to the plaintiff, and water escaping from the cistern wetted the plaintiff's goods, the Court of Exchequer held that, as there was no want of reasonable care on the defendant's part, the plaintiff could not recover. Martin B. said: (2) "Now I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently. Probably the defendant was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance would have provided against." Much the same language is used by Wright J. in *Gill* v. *Edouin*. (3) [In *Ross* v. *Fedden* (4), where the facts were similar, Blackburn J. said (4): "Negligence is negatived; and probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences." But the point was expressly decided in *Hargroves & Co.* v. *Hartopp* (5), where damage was caused by water overflowing from a gutter

(1) L. R. 6 Ex. 217.
(2) L. R. 6 Ex. 222.
(3) 71 L. T. 762; affirmed 72 L. T. 579.
(4) L. R. 7 Q. B. 661, 665.
(5) [1905] 1 K. B. 472.

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which had become stopped up, and the landlord having notice of a stoppage did nothing to remove the obstruction. The Court held that the landlord must take reasonable care to prevent that portion of the premises which was kept under his own control from causing damage to those portions which were demised to the tenant and that the plaintiffs had established the liability of the defendants. The authority of that case has been recognized in *Cavalier* v. *Pope* (1) and *Fairman* v. *Perpetual Investment Building Society*. (2) Whether this duty arises out of a contract between the parties, or whether it is an instance of the duty imposed by law upon an occupier of premises to take reasonable care that the condition of his premises does not cause damage, I prefer not to decide. Lord Buckmaster speaks of it as a contractual obligation (3), and Greer J. as arising out of contract. There is much to be said for that view, but it is an immaterial question. If the duty is imposed by law, the point on which Greer J. decided in favour of the respondent does not arise, and the appellant's right to damages is clear as soon as it is established that the respondents were guilty of negligence. On that question of negligence it is impossible to interfere with the learned judge's conclusion. In October, 1921, the respondents or their agents had notice of the state of the walls which called for immediate attention, but nothing was done until the following February. Sir Henry Maddocks relied on *Blake* v. *Woolf* (4) as exempting the respondents from liability because they communicated to a firm of builders the state of things. But mere communication is not enough to exonerate them. If the builder takes the work in hand the employer may be absolved on the principle of *Blake* v. *Woolf* (4), but that case has no application where the builder does nothing; and where the employers know that their communication is producing no result, I have no difficulty in finding that they are negligent. If they are liable the damages have been assessed by the learned judge at 205*l*.

The remaining question arises on the assumption that the

(1) [1906] A. C. 428.
(2) [1923] A. C. 74.
(3) [1923] A. C. 81.
(4) [1898] 2 Q. B. 426.

duty upon the respondents arises out of contract. It is said that the landlords have expressly agreed to do certain repairs—namely, to keep the entrance hall, staircases, passages and landings in good repair—and that this must be the full extent of their liability on the principle that "Expressio unius exclusio alterius" or, as the learned judge has held, by an application of the maxim "Expressum facit cessare tacitum." I cannot agree that either maxim applies in this case. No doubt if a landlord demises premises to a tenant there is ground for arguing that the tenant expressly agreeing to do certain repairs to the demised premises is not liable to do other repairs. In the present case the landlords have demised the suite of rooms with the usual fittings and appurtenances; and although they have not expressly granted any licence to use stairs or passages, they have, by restricting the user of them, impliedly granted such a licence; and they have expressly undertaken a corresponding obligation to keep them in a condition in which they can be used. But the roof of the building, the means of excluding rain and water and of keeping the flat habitable, is not among the premises expressly or impliedly demised or granted. In my opinion express agreements concerning premises demised or granted do not exclude tacit agreements concerning matters which are neither demised nor granted, and I cannot think either party contemplated that because the landlords had agreed to keep the entrance hall, staircases, passages, and landings sufficiently lighted and in good repair, they should therefore be relieved of all duty to take reasonable care that the roof and gutters should not be in such a condition as to render the demised premises uninhabitable. For these reasons I think the appeal should be allowed.

SCRUTTON L.J. The habit of living in flats contained in one building and served by a common staircase gives rise to difficult questions concerning the responsibility for accidents happening on the staircases to tenants of the flats and tradesmen and visitors frequenting them. These questions were discussed and elucidated in *Fairman* v. *Perpetual*

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Scrutton L.J.

Investment Building Society. (1) The present case raises the question of the landlord's liability for defects in the common guttering in the common roof covering the building which contains the flats. The appellant occupies one of the top flats in a large building covered by a roof which is provided with guttering for conducting rainwater for the common benefit of all the flats. In June, 1921, she gave notice to the respondents that signs of damp had appeared in one of the bedrooms. In October the signs of damp increased and spread to the dining room and other rooms. This incursion was found to be due to the fact that part of the guttering, the stop-end as it is called, had fallen away, so that water which ought to have found its way down the outlet pipe escaped and ran down the side of the wall containing the appellant's flat. As soon as this happened notice was given to the respondents, but nothing was done till January. From October till the end of January water was running down the wall and entering the flat. The appellant's health was injured and she sustained damage which the learned judge has assessed at 205*l.*

In my opinion there is enough here to impose a liability upon the respondents at common law. They have constructed for their own purposes an artificial system for collecting water and have allowed the water to escape owing to a defect in their system of which they have had notice and to remedy which they have done nothing. If this had happened between two adjoining houses and water had escaped to one of them owing to a defect in an artificial construction upon the other, it is admitted that the case would have fallen within the principle of *Rylands* v. *Fletcher.* (2) But, as was pointed out by Wright J. in *Gill* v. *Edouin* (3), there are exceptions which modify the rule in *Rylands* v. *Fletcher* (2) and reduce the duty of insuring against damage to an obligation to take reasonable care that damage does not occur. One of these exceptions is where the premises on which the artificial construction is erected

(1) [1923] A. C. 74. (2) L. R. 3 H. L. 330.
(3) 71 L. T. 762; 72 L. T. 579.

and the premises damaged by the escape of water are in one house and the construction is erected for the use of both premises. In this case the occupier of the latter premises takes the ordinary risks of damage from escaping water. This is the fourth exception mentioned in *Gill* v. *Edouin* (1), of which *Ross* v. *Fedden* (2) is an example; and there it cannot be said that the landlord who collects the water must keep it in at his peril. *Ross* v. *Fedden* (2) and *Hargroves & Co.* v. *Hartopp* (3) justify me in holding that in cases of this class the person who maintains the artificial construction is liable for the consequences of escaping water if after notice of a defect he omits to use reasonable care to repair it. These cases rest on the liability which arises from artificial creation of a danger. In *Hart* v. *Rogers* (4), an action for damages caused by water leaking through the roof of a flat, the plaintiff recovered on the footing of an absolute duty upon the defendant, and not merely a duty to take reasonable care, to repair the roof. The state of the authorities then was that the decision of the Court of Appeal in *Miller* v. *Hancock* (5), though doubted and explained, had not been overruled, and the process of explaining it implied a failure on the part of Bowen L.J. to express in precise language his views on elementary principles. It was not brought to the attention of the judge who decided *Hart* v. *Rogers* (4) that the Court of Appeal in *Dobson* v. *Horsley* (6) had explained *Miller* v. *Hancock* (5), and he thought he was still bound by that decision. *Miller* v. *Hancock* (5) has now been overruled in *Fairman's Case* (7), and *Hart* v. *Rogers* (4) is no longer an authority that the landlord in a like case is under an absolute duty to keep the roof in repair. In my view his duty may be based upon that modified doctrine of *Rylands* v. *Fletcher* (8), which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant. I reserve the question whether this is also a contractual liability arising out of the relation

(1) 71 L. T. 762 : 72 L. T. 579.
(2) L. R. 7 Q. B. 661.
(3) [1905] 1 K. B. 472.
(4) [1916] 1 K. B. 646.
(5) [1893] 2 Q. B. 177.
(6) [1915] 1 K. B. 634.
(7) [1923] A. C. 74.
(8) L. R. 3 H. L. 330.

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of landlord and tenant. In either case there is ample ground for holding the respondent liable. The appeal must therefore be allowed.

SARGANT L.J. I agree. The first thing to be considered is the subject matter of the demise. That is part of a building which in its entirety contains four tiers of flats some of which are placed side by side. The demised portion is described as "all that suite of rooms known as No. 16 Prebend Mansions . . . . together with coal bunker No. 16 in the building of which the premises form part." A common roof extends over those flats, which are laterally contiguous; therefore there is no real ground for contending that because one of the flats was a top flat therefore the demise of that flat included the portion of the roof which covered it and with it the flats below. The demise included only the suite of rooms. The roof after that demise remained in the occupation of the landlords as it had been before the demise. Defects arose in the guttering. I agree that the landlords were guilty of negligence in making no effort to remedy the defect. As a result the flat became damp and the appellant suffered injury and incurred expense in consequence.

Hargroves & Co. v. *Hartopp* (1) has received the approval of the House of Lords. It is a direct authority that the tenant of a flat is in these circumstances entitled to recover; but it is not quite clear whether the landlord's duty is founded on some implied covenant or obligation in the contract of tenancy or from the circumstances that the landlord retains physical possession of the roof and lets the flat to the tenant. In my view it is not necessary to decide that difficult question. The view most favourable to the landlords is that their liability arises from an implied contract. The learned judge has dealt with the case on that footing, and I will do the same, only observing that if the obligation arises merely from the fact of retaining possession of the roof, that obligation cannot be displaced by any express covenant affecting the premises the subject matter of the contract of tenancy. Assuming then

(1) [1905] 1 K. B. 472.

that there is an implied contract arising out of the agreement of tenancy, that may be displaced by an express contract relating to the same subject matter. In that case the maxim Expressio unius exclusio alterius, or Expressum facit cessare tacitum, would be applicable. But here there is no express contract relating to the roof. The express stipulations relate only to the subject matter demised and the methods of access thereto; and when it is decided that the roof is outside the demise and a separate hereditament which remains in the possession of the landlord, those maxims cease to apply, because there is no express contract affecting it, while there is ex hypothesi an implied contract affecting it; an implied contract which is not displaced by express contracts relating to subject matters which are within the demise. Therefore the learned judge was wrong in holding that an express contract relating to the staircases and approaches involved any modification or exclusion of the implied contract relating to a different subject matter—namely, the roof and the guttering. He has assessed the appellant's damages at 205*l.* and she should have judgment for that amount.

Appeal allowed.

Solicitors for appellant: *Williams & Tremayne.*

Solicitors for respondents: *Maude & Tunnicliffe, for Taylor, Simpson & Mosley, Derby.*

W. H. G.

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LEWIS *v.* McKAY.

ALGATE *v.* VUGLER.

CLARK *v.* POTTER.

Emergency Legislation—Landlord and Tenant—Rent in Excess of Standard Rent—Claim for Recovery of Excess by Tenant—"Shall be recoverable . . . . within six months"—Summons issued within six Months—Judgment after Expiration of six Months—"Recoverable"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 14, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 8, *sub-s.* 2.

By s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, rent overpaid by a tenant because in excess of the standard rent, and which by s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is recoverable by him from the landlord, "shall be recoverable . . . . in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards":—

Held, that it is sufficient if proceedings for recovery are commenced within the six months, although judgment thereon be not recovered until after the six months have expired.

APPEALS from Llanelly, Plymouth and Woolwich County Courts respectively.

By s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), a tenant who has paid a sum of money to his landlord as part of his rent which is irrecoverable by the landlord because in excess of the standard rent, may recover it back or deduct it from rent payable by him. By s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), "Any sum paid by a tenant . . . . which, under sub-s. 1 of s. 14 of the principal Act [the Act of 1920] is recoverable by the tenant . . . . shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

In each of the cases under appeal the tenant had paid the moneys claimed before the passing of the Act of 1923, and

had issued a summons in the county court within six months of July 31, 1923, the date of the passing of the Act of 1923, claiming repayment under the Act of 1920, but the respective judgments were all given on dates more than six months after July 31, 1923.

The deputy county court judge and the county court judge respectively in the cases of *Lewis* v. *McKay* and *Algate* v. *Vugler* held that the moneys claimed were recoverable, and that the tenants were within the time limited by the sub-section, because they had commenced proceedings within the six months, although the judgments had been delivered after that period had expired. The county court judge in *Clark* v. *Potter* came to a contrary decision and refused to entertain the plaintiff's claim. The defendants in the two first-named cases and the plaintiff in the last-named case appealed. The arguments in the three cases were heard before judgment was given.

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D. Rowland Thomas for the defendant. The deputy county court judge was wrong in holding that the plaintiff was within the six months, basing his decision on the fact that he had issued his summons within that period. "Recoverable" in s. 8, sub-s. 2, of the Rent, &c., Restrictions Act, 1923, means that there shall be a liability for, that is, there must be within the six months a liability on the landlord to repay the overpaid amount, and there is no liability until judgment. Recoverable does not mean recoverable by action only, it includes recovery by deduction from after-accruing rent: see s. 14, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920. Therefore if a tenant deducts from his rent during the six months and at their expiration a balance remains due to him he cannot recover that balance. There is no reason why a tenant who elects to seek his remedy by action should be in any better position. Wills J. in *Morris* v. *Duncan* said (1): "As applied to a sum of money, a penalty, or a debt, 'recovery' is perfectly

(1) [1899] 1 Q. B. 4, 6.

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well understood to mean the obtaining of the judgment of the Court, upon which the sum, penalty, or debt becomes payable." "Recoverable" means "recovered."

No counsel appeared for the plaintiff.

ALGATE *v.* VUGLER.

Beney for the defendant. The argument for the defendant in *Lewis* v. *McKay* is adopted. The history of overpaid rent under the Rent Restrictions Acts is important. Previous to 1917 it was irrecoverable because paid under a mistake of law: *Sharp Brothers and Knight* v. *Chant* (1). Sect. 5, sub-s. 1, of the Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), enacted that it should be "recoverable" in certain circumstances, and this was re-enacted, almost textually, in s. 14, sub-s. 1, of the Act of 1920. These Acts clearly intended to impose a liability on landlords which did not previously exist, and that liability could only, in the case of legal proceedings, be imposed by a judgment. Therefore "recoverable" in s. 8, sub-s. 2, of the Act of 1923, means the same thing as in the Acts of 1917 and 1920. Limitation Acts do not generally destroy the right but only bar the remedy, but here the right is destroyed after the six months. This would not prevent the enforcement of a judgment after the expiration of the six months if it was obtained before their expiration, for a defendant cannot go behind the judgment.

No counsel appeared for the plaintiff.

CLARK *v.* POTTER.

Casswell for the plaintiff. In this case the county court judge held that the plaintiff was out of time. It is submitted that he was wrong. Some county courts are very congested, and if the county court judge's view is right, then a tenant's rights would depend upon whether he was able to get his case heard in time, a matter over which he has no control.

(1) [1917] 1 K. B. 771.

[Real Property Limitations Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, and *In re Turner* (1) were referred to.]

[He was stopped.]

Merriman K.C. and *Ralph Thomas* for the defendant. The decision of the county court judge was right. The arguments of Mr. Rowland Thomas and Mr. Beney are adopted. By Order XLI., r. 3, of the Rules of the Supreme Court, which by s. 164 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), is made applicable to county courts, a judgment may by special leave of the Court be ante-dated, therefore the hardship which it is suggested would be caused by making the date of the judgment the vital date does not exist. And this leave could be given by the county court judge himself. Cases under statutes of limitation are not in point, for the question there is when was the action brought, not when was the remedy obtained. The words of s. 14, sub-s. 1, of the Act of 1920 show that "recoverable" means recoverable effectively, for after providing for recovery from the landlord by action it goes on to provide for recovery by deduction "without prejudice to any other mode of recovery." The Legislature must be taken to be comparing like with like, and recovery by deduction is recovery in fact, effective recovery. The issue of a writ or summons is not recovery in fact.

[*Landrigan* v. *Simons* (2) and *Reg.* v. *Mainwaring* (3) were referred to.]

SWIFT J. In these three cases exactly the same point arises for decision. It is clear that if the appeal is allowed in the case of *Clark* v. *Potter* it will have to be remitted to the county court judge in order that he may determine certain matters upon which he has given no decision and which are necessary to be determined if he be wrong on the one point we are deciding. That point is not a difficult one, although no doubt important in the light of the claims made by tenants for the return of moneys which they allege they have paid in

(1) [1917] 1 Ch. 422. (2) [1924] 1 K. B. 509.
(3) (1858) 27 L. J. (M. C.) 278.

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excess of the lawful rent. The matter arises in this way. In the case of *Sharp Brothers and Knight* v. *Chant* (1) the Court of Appeal held that although by s. 1, sub-s. 1, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), it was enacted that where the rent of a dwelling house was increased above the standard rent the excess should be irrecoverable, nevertheless a tenant who had paid the excess was not entitled to recover it from the landlord because he had paid it under a mistake of law. Following on that decision s. 5, sub-s. 1, of the Courts (Emergency Powers) Act, 1917, provided that the tenant might recover such overpayments within six months. That Act continued in force until the passing of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which by s. 19, sub-s. 3, and the Second Schedule repealed the Act of 1915 and s. 5 of the Act of 1917, and by s. 14, sub-s. 1, made the overpayments recoverable without imposing any time limit. The Rent and Mortgage Interest Restrictions Act, 1923, by s. 8, sub-s. 2, reimposed a time limit for the recovery of overpayments. It is with reference to the construction of that sub-section that these three cases come before us. It provides that: "Any sum paid by a tenant . . . . which under sub-s. 1 of s. 14 of the principal Act [of 1920] is recoverable by the tenant . . . . shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards." In *Lewis* v. *McKay* and *Algate* v. *Vugler* the county court judges held that if the tenant starts the proceedings to recover the overpayments within such period of six months he is entitled to recover although judgment be not given until after the expiration of the six months. In *Clark* v. *Potter* the county court judge held that not only must the action be brought but that it must be pursued to judgment and judgment obtained within the six months. The dates in these cases were as follows. In *Lewis* v. *McKay* the summons was issued on November 30,

(1) [1917] 1 K. B. 771.

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1923, well within six months of July 31, 1923, the date of the passing of the Act of 1923. The case was not heard until February 1, 1924, one day after the expiration of the six months, not through any default of the plaintiff but by reason of the state of business in the court. The deputy county court judge took the view that the money was recoverable under the Act within six months and did not cease to be recoverable because the plaintiff, who had taken all the steps he could, was unable to compel the court to deal with his case within the six months.

In the case of *Algate* v. *Vugler* the summons was issued on January 26, 1924, and judgment given on February 12, 1924. The same contention was raised as in *Lewis* v. *McKay*, and the county court judge said: "The words of the Act are 'shall be recoverable' and not 'shall be recovered.' In my opinion by 'shall be recoverable . . . . at any time within six months from the passing of this Act but not afterwards' is meant 'shall be a sum capable of being recovered by deduction from rent, action or otherwise at any time within, &c.' In other words, during that period it shall be capable of recovery, but after that period it shall be incapable of recovery. In 3 & 4 Will. 4, c. 27, s. 42, the words are 'No arrears of rent . . . . shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due.' Yet under this section the limit from which the six years is calculated is apparently the commencement of proceedings." (1)

In the remaining case, *Clark* v. *Potter*, the summons was issued on January 9, 1924, and judgment given on February 12, 1924, and the county court judge took the contrary view, and held that as the case did not come before him until more than six months after the passing of the Act, it was not competent in him to hear it, and dismissed the tenant's claim. The question we have to consider is which of these two

(1) See *Hughes* v. *Williams* (1850) 3 Mac. & G. 683; *Francis* v. *Grover* (1845) 5 Hare, 39; *Chappell* v. *Rees* (1852) 1 D. M. & G. 393; *In re Walker* (1871) L. R. 7 Ch. 120; and *Thomson* v. *Eastwood* (1877) 2 App. Cas. 215.

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conflicting views is the proper one. Is it right to say that s. 8, sub-s. 2, of the Act of 1923 means that the claim is barred unless the tenant actually recovers judgment within the six months, or that it means that it is sufficient if the action is brought within the six months? I have no doubt whatever that the latter is the correct meaning. I think it is impossible to suppose that the Legislature ever intended to put upon a tenant who had paid more rent than he ought to have paid the onus of compelling the court to decide his case at a particular time so as to bring its decision within the six months. He has no control over the matter at all. I think the sole object of the sub-section was to put the tenant in this position, that whether he sought to recover the money by claim or by deduction from rent becoming due, the claim must be brought or the deduction made within the six months, and that the claim is made when the summons is issued. Under these circumstances I think that the appeals in *Lewis* v. *McKay* and *Algate* v. *Vugler* must be dismissed, and the case of *Clark* v. *Potter* referred back to the county court judge.

ACTON J. I agree.

Judgment accordingly.

Solicitors for appellant in *Lewis* v. *McKay: Speechly, Mumford & Craig, for John Lewis Phillips, Llanelly.*

Solicitors for appellant in *Algate* v. *Vugler: Kenneth Brown, Baker, Baker.*

Solicitor for appellant in *Clark* v. *Potter: J. H. MacDonnell.*

Solicitors for respondent in *Clark* v. *Potter: Shalless & Ladner.*

W. L. L. B.

ASTON *v.* SMITH.

1924
April 9, 10.

Emergency Legislation—Landlord and Tenant—Notice of Increase of Rent—Tenant holding Over—Subsequent Claim for Possession—No Notice to quit—Notice of Increase of Rent deemed to be Notice to quit—Necessity for fresh Notice to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1—*Rent Restrictions (Notices of Increase) Act*, 1923 (13 & 14 *Geo.* 5, *c.* 13), *s.* 1, *sub-s.* 1.

In May, 1920, a notice of increase of rent was given by the plaintiff to the defendant, and rent was subsequently paid thereunder by the latter, who remained in possession as statutory tenant. In 1924 the plaintiff claimed possession of the premises, but did not at the time give any notice to quit.

By s. 1, sub-s. 1, of the Rent Restrictions (Notices of Increase) Act, 1923, a notice of intention to increase the rent "shall have effect and shall be deemed always to have had effect as if it were or had been also a notice to terminate the existing tenancy":—

Held, that as the defendant had received what was to be deemed a notice to quit in May, 1920, and had remained in possession, no fresh notice to quit was necessary.

APPEAL from Shoreditch County Court.

The appellant, the plaintiff, Frederick Aston, was the landlord, and the respondent, the defendant, Frederick William Smith, was the tenant of a dwelling house, 7 Canterbury Terrace, Dalston, at a weekly rent. On August 21, 1923, the plaintiff gave the defendant notice to quit on the ground that he required the house for his own occupation, and issued a summons in the county court claiming possession. The county court judge held that the notice was a bad notice. Thereupon counsel for the plaintiff contended that for the following reasons notice to quit was unnecessary. It appeared in evidence that on May 3, 1920, the plaintiff had served on the defendant a notice of increase of rent, which had been accepted and acted upon by the defendant. It was contended on behalf of the plaintiff, on these facts, that the original tenancy of the defendant had been terminated by the notice of increase of August 21, 1920, followed by his continuance in possession, and that he then became and had remained since a statutory tenant, and that by reason of the provisions of s. 1, sub-s. 1, of the Rent Restrictions (Notices of Increase) Act, 1923 (13 & 14 Geo. 5, c. 13), which enacted that a notice

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of increase of rent shall have effect and shall be deemed always to have had effect as a notice to quit, the notice of May, 1920, was to be deemed a notice to quit, and, the defendant having so held over, no fresh notice to quit was necessary: *Shuter* v. *Hersh.* (1)

The county court judge rejected this contention and gave judgment for the defendant.

The plaintiff appealed.

Rossiter for the plaintiff. The county court judge was wrong. By virtue of s. 1, sub-s. 1, of the Rent Restrictions (Notices of Increase) Act, 1923, the notice of increase of rent of August 21, 1920, had a dual operation, that of a notice of increase and that of a notice to quit, and the Act is retrospective in its operation, for it provides that the notice "shall have effect and shall be deemed always to have had effect as if it were or had been also a notice to terminate the existing tenancy." The defendant, having continued in occupation after that notice, became a statutory tenant, and therefore a fresh notice to quit became unnecessary: see the proviso to s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), and *Shuter* v. *Hersh.* (1) It is said that the defendant is entitled to notice, because by s. 15, sub-s. 1, of the Act of 1920 he is "entitled to the benefit of all the terms and conditions of the original contract of tenancy," and that one of those terms is the right to a notice to quit. But by the same sub-section he "shall . . . . observe" the said terms and conditions, and he must therefore accept a notice to quit.

R. G. S. Bankes for the defendant. The object of s. 1, sub-s. 1, of the Act of 1923 was to make the notice of increase good by assuming a notice to quit, but not to make the notice of increase a good notice to quit for all purposes. It is clear that at common law the defendant is entitled to a notice to quit, and he could not be ordered to give up possession under s. 138 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), without having received such a notice. Therefore unless

(1) [1922] 1 K. B. 438.

some statute says that he is not entitled to a notice to quit, the common law rule still applies.

SWIFT J. This is an appeal from the judge of the Shoreditch County Court, who decided that the landlord, the plaintiff, was not entitled to the possession of premises held by his tenant, the defendant, because he had not given a proper notice to quit. The tenancy was a weekly one at a rent of 1*l.* 0*s.* 2*d.* per week, and on August 21, 1923, the plaintiff served on the defendant a notice to quit. The county court judge, on the authority of *Queen's Club Gardens Estates, Ld.* v. *Bignell* (1) held that the notice was bad. It is unnecessary for us to consider whether he was right or wrong. Sitting in this Court, constituted as it is now, I had expressed a different view of the law in *Simmons* v. *Crossley* (2), but the Divisional Court in *Queen's Club Gardens Estates, Ld.* v. *Bignell* (1) did not follow the propositions I had laid down in the former case. (2) In the present case, Mr. Rossiter, for the plaintiff, invited the county court judge to say that a notice to quit was not necessary at all, because the defendant was a statutory tenant within s. 15, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, and that the plaintiff was entitled to claim possession without showing that he had given a notice to quit after the defendant had become a statutory tenant. The county court judge refused to accept that proposition of law, and we have to decide whether he was right. Having held that the notice of August 21 was bad there was in fact no notice to quit before the county court judge, and the question is whether the defendant, who was a statutory tenant, was entitled to such a notice.

The first contention is that a tenant cannot be a statutory tenant unless he has received a notice to quit while still an ordinary tenant, and quite apart from the Rent Act, no such notice had in fact been given in this case. But in May, 1920, a notice of increase of rent was given by the plaintiff to the defendant. The defendant received that notice and paid the increased rent under it, and subsequently, as from time to

(1) [1924] 1 K. B. 117. (2) [1922] 2 K. B. 95.

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time other increases became permitted increases, further notices were given to and accepted by the defendant. Mr. Rossiter, for the plaintiff, contends that under s. 1, sub-s. 1, of the Rent Restrictions (Notices of Increase) Act, 1923, a notice of increase of rent is in effect a notice also to terminate the existing tenancy on the day immediately preceding the day as from which the increase was first to take effect, or on the earliest day thereafter on which, if it had been a notice to terminate the tenancy, it would have been effective for that purpose, and that for all purposes a notice of increase must be taken to be a notice to quit. He says, therefore, that the defendant, the tenant, having received the notice of increase, which must be deemed also to be a notice to quit, and not having given up possession, retained possession thereafter as a statutory tenant. If the tenant was a statutory tenant, no further notice to quit is necessary, for it would have no effect. Having become a statutory tenant the tenant can only be dispossessed by the act of the Court, and not by any act of the landlord. He is a person who has a personal right not to have an order for possession made against him, and that is the only right he possesses. He cannot assign, sub-let or demise it or deal with it in any way. It is his so long as he retains possession; it ceases to be his as soon as he ceases to retain possession: see the judgment of Bankes L.J. in *Shuter* v. *Hersh* (1) and the case of *Keeves* v. *Dean*. (2)

Mr. Bankes, for the tenant, in his very able argument, contended that at common law he had a right to a notice to quit, and that under s. 138 of the County Courts Act, 1888, he could not have been ordered to give up possession of the premises. But the tenant here was not a tenant at common law, but under the statute. The whole scheme of the Act is to make a notice to quit a perfectly useless and ineffective weapon. There was a time when a notice to quit had to be given before an increase of rent could be made, but that notice had to be given solely for the purpose of making the tenant a statutory tenant. It was necessary, because the landlord had to show that he would be entitled to recover

(1) [1922] 1 K. B. 438, 447. (2) [1924] 1 K. B. 685.

possession of the premises but for the provisions of the Rent Acts. That necessity has now been done away with by the Rent Restrictions (Notices of Increase) Act, 1923, and no further notice to quit has been substituted. I think the county court judge was wrong, and that this appeal should be allowed.

ACTON J. I am of the same opinion and for the same reasons. This was a case in which the landlord by virtue of s. 138 of the County Courts Act, 1888, sought to recover possession of premises of which he had been the landlord for some years, on the ground that he desired to occupy them himself, and that section provides the requisite machinery for recovery of possession where the term has been determined by notice or has expired. The action in the present case was based in the particulars of claim on the averment that the tenancy had been terminated by the notice to quit of August 21, 1923, and the landlord's claim rested on that notice alone. When evidence came to be given it appeared that the notice was given to expire, not one week thereafter, but on September 29, four weeks after the date of the notice ; and it further appeared that September 29 fell on a Saturday, and that the rent had always been paid on Monday. The county court judge did not accept evidence to show that the tenancy was a tenancy from Saturday to Saturday, and came to the conclusion that it was from Monday to Monday, and consequently that the notice to quit was bad and of no effect. It is quite unnecessary for us to consider whether he was right or wrong, for Mr. Rossiter in his clear and able argument fell back on the point now before us. It is this. He says, let it be conceded for the purposes of the plaintiff's case that the notice of August 21, 1923, was bad. He is still entitled to succeed, because it has appeared in evidence that on May 3, 1920, there was served upon the tenant, the defendant, a notice of increase of rent, which was acted upon and which was succeeded by other notices of increase also acted upon. Mr. Rossiter says that having regard to s. 15 of the Increase of Rent, &c. (Restrictions), Act, 1920, and s. 1, sub-s. 1, of the

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Rent Restrictions (Notices of Increase) Act, 1923, the notice of increase of May 3, 1920, had a dual effect—namely, that of increasing the rent and also that of terminating the tenancy which had existed heretofore upon the earliest day after the day on which the increase was first to take effect upon which it would have been effective if it had been a notice to quit. If s. 1, sub-s. 1, of the Act of 1923, and s. 15, sub-s. 1, of the Act of 1920, are read together in the light of the observations made upon the latter section by Bankes L.J. in *Shuter* v. *Hersh* (1), it clearly appears that Mr. Rossiter's contention is right, and that the notice of May 3, 1920, had the dual effect contended for, that as a result thereof it operated to effect the determination of the tenancy, and that thereafter it was quite unimportant whether by agreement, express or implied, any other relation was thought to spring up than that of statutory landlord and tenant, or whether any subsequent notice to quit was served on the basis that it was necessary. I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Sturton Sturton.*

Solicitors for respondent: *Devonshire, Wreford Brown, Hewett, Baggallay & Co.*

W. L. L. B.

(1) [1922] 1 K. B. 438, 447

PRECIOUS *v.* REEDIE.

1924
April 14.

Landlord and Tenant—Monthly Tenancy—Determination of Tenancy—Validity of Notice.

In order that a monthly tenancy may be determined by notice to quit, the notice, in the absence of special agreement, must be a month's notice expiring at the end of a periodic month from the commencement of the tenancy.

A monthly tenancy began on the first day of the month and so continued from month to month. On September 5, 1923, the tenant received by post from the landlord a notice dated September 1, 1923, and purporting to give him "one month's notice to quit":—

Held, that the notice to quit was invalid, inasmuch as it did not expire at the end of the monthly term.

Queen's Club Gardens Estates v. *Bignell* [1924] 1 K. B. 117 followed.

Simmons v. *Crossley* [1922] 2 K. B. 95 not followed.

APPEAL from Scarborough County Court.

The plaintiff was the landlord and the defendant the tenant of a dwelling house, No. 5 Commercial Street, Scarborough, which was let upon a monthly tenancy commencing on the first day of the month and so continuing. On September 5, 1923, the tenant received by post from the landlord a notice to quit, dated September 1, 1923, and in the following terms: "Mr. Reedie, I hereby give you one month's notice to quit 5 Commercial Street, as I require the house for occupation. (Signed) James Precious." The landlord claimed possession of the house by virtue of this notice, and the county court judge held that the notice was a good notice for October 31, 1923, which was the earliest possible date at which the tenancy could determine. He so held upon the authority of *May* v. *Borup*. (1)

The tenant appealed.

A. Cairns for the tenant. This notice to quit is invalid. For although dated September 1 it was not served until September 5, and thus the tenant did not receive the month's notice which is requisite in the case of a monthly tenancy. The principle that the notice must expire at the end of the

(1) [1915] 1 K. B. 830.

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term applies to monthly as well as weekly tenancies: *Queen's Club Gardens Estates* v. *Bignell* (1), in which the Divisional Court (Lush and Salter JJ.) gave judgment to this effect. In *Savory* v. *Bayley* (2) Bailhache J. held in the case of a tenancy "for four weeks and if not then determined, to continue," that notice must be such as to bring the tenancy to an end "on a day which is a periodical recurrence of that on which the tenancy began." *May* v. *Borup* (3) has no application here. That was the case of a yearly tenancy, and the notice was saved by the fact that the tenants had given notice to quit "at the earliest possible moment."

Paley Scott for the landlord. There is no authority for the proposition that a monthly tenant is entitled to a month's notice. He is only entitled to reasonable notice, and as to this there is no finding by the county court judge. It is submitted that this notice served on September 5 to take effect at the end of the current month is reasonable.

If a month's notice is necessary then the present notice is a valid notice to quit for October 31; for the landlord could at any time have made it good by inserting a date more than a month ahead. As regards *Queen's Club Gardens Estates* v. *Bignell* (1) that is contrary to the decision in *Simmons* v. *Crossley* (4) and also in the Irish cases *Harvey* v. *Copeland* (5) and *Skelly* v. *Thompson.* (6) In any event that decision is only binding as to weekly tenancies, and the expressions of opinion by Lush J. as to monthly tenancies are dicta only.

BAILHACHE J. This case raises the question of the length of notice to which a monthly tenant is entitled. It is admitted that the defendant held these premises on a monthly tenancy and that the tenancy began on the first of the month, and that the landlord sent this notice to quit which reached the tenant on September 5, 1923. [His Lordship read the notice and continued:] If a month's notice is necessary, this

(1) [1924] 1 K. B. 117.
(2) (1922) 38 Times L. R. 619.
(3) [1915] 1 K. B. 830.
(4) [1922] 2 K. B. 95.
(5) (1892) 30 L. R. Ir. 412.
(6) (1911) 45 Ir. L. T. 138.

notice is not a valid notice to quit for October 1. The county court judge has not dealt with the question whether the notice was reasonable, but has treated it as a good notice for October 31. The cases of *Queen's Club Gardens Estates* v. *Bignell* (1), *Simmons* v. *Crossley* (2), and *May* v. *Borup* (3) were referred to, and this last case the county court judge proposed to follow, although I do not think he rightly appreciated its effect. In that case the tenancy was a yearly tenancy, and the tenants wrote to the landlord giving notice to quit "at the earliest possible moment," which was six months from the date of the commencement of the tenancy. There was nothing uncertain in the notice, because the landlord would know when the tenancy began, and therefore would know what was the earliest possible moment at which it could be determined. In *Simmons* v. *Crossley* (2) the Divisional Court (Swift and Acton JJ.) held that to determine a monthly tenancy "reasonable" notice only need be given, and that such notice is not invalid merely because it expires on a day other than the last day of the month calculated from the commencement of the tenancy. The question what is reasonable notice necessarily depended on the circumstances of the particular case. In *Queen's Club Gardens Estates* v. *Bignell* (1) the Divisional Court (Lush and Salter JJ.) held that, in a weekly tenancy, a week's notice to quit was necessary, and that it must expire at the end of the weekly term. The reasoning of the Court, and particularly of Lush J., in that case leads irresistibly to the conclusion that there is no distinction between a monthly and a weekly tenancy in this respect. There is no definite authority on the point, although there are occasional expressions of opinion that a month's notice is sufficient. My own view accords with that of the Court in the *Queen's Club Gardens Estates Case* (1)—namely, that in a monthly as in a weekly tenancy, the period of the notice to quit must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. Here the notice which reached the

(1) [1924] 1 K. B. 117. (2) [1922] 2 K. B. 95.
(3) [1915] 1 K. B. 830.

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Bailhache J.

tenant on September 5 was obviously invalid. It is not a question of reasonable notice, but of a month's notice terminating on a particular day. The notice would have been effective on October 31, if it had contained such additional words as that the tenancy should terminate in a month's time or so soon thereafter as the tenancy would expire. Here there are no such words; it is notice for a definite date and is invalid. A notice to quit is always strictly construed, and cannot be afterwards amended by the party who serves it.

SANKEY J. In a weekly or monthly tenancy the period for which notice to quit must be given must always be regulated by the date and length of the letting, unless there is some special agreement. In a weekly tenancy the notice to quit is a week's notice expiring at the end of a periodic week, and in a monthly tenancy a month's notice expiring at the end of a periodic month.

The county court judge purported to follow *May* v. *Borup* (1), but in that case the notice contained words requiring the tenancy to determine "at the earliest possible moment." Here there is no such saving clause, and for the reasons already given the notice is invalid.

Appeal allowed.

Solicitors for tenant: *Radford & Frankland, for Whitfield, Bell & Co., Scarborough.*

Solicitors for landlord: *A. F. & R. W. Tweedie, for Watts, Kitching & Donner, Scarborough.*

(1) [1915] 1 K. B. 830.

F. P. F.

W. P. GREENHALGH AND SONS *v.* UNION BANK OF MANCHESTER.

1924
April 15.

Banker—Customer—Two Accounts—Bills specifically appropriated to One Account—Equitable Assignment—Right of Banker to transfer Proceeds to the other Account.

A banker who has agreed with a customer to open two accounts in his name, and who holds bills which the customer has specifically appropriated to one account, is not entitled, without the customer's consent, to transfer the proceeds of such bills to the other account.

ACTION tried before Swift J. at Manchester Assizes.

The plaintiffs, cotton brokers in Liverpool, sold to Messrs. Winson & Co., who were cotton merchants in Manchester, a quantity of cotton to be shipped from Alexandria to Manchester. Winson & Co. sold the cotton so purchased to certain firms of spinners, and received bills from them in payment. Winson & Co. paid the bills into the defendant bank, and the plaintiffs alleged that the proceeds of the bills had been specifically appropriated to meet their own bills which Winson & Co. had accepted, that notice of such appropriation had been given to the bank, and that they were therefore entitled to claim the proceeds from the bank as money received to their use. The plaintiffs further contended that they were equitable assignees of the proceeds of the bills. The defendants denied that any specific appropriation had been made by Winson & Co., and alleged that there was no contractual relationship between themselves and the plaintiffs. The defendants paid the proceeds of the bills into the general account of Winson & Co., where they were absorbed by an overdraft. The facts are fully set out in the judgment of Swift J.

Cyril Atkinson K.C. and *J. Lustgarten* for the plaintiffs.
Eastham K.C. and *N. J. Laski* for the defendants.

Cur. adv. vult.

1924. April 15. SWIFT J. read the following judgment: On October 13, 1922, Messrs. W. P. Greenhalgh & Sons, who carry on business as cotton brokers at Liverpool, sold to

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Swift J.

Messrs. Winson & Co., cotton merchants of Manchester, twenty-five bales of Sakel Egyptian cotton, marked F.O.K., to be shipped by steamer from Alexandria to Manchester. The contract note of the sale is dated October 13, and provided for payment in the following terms: "Reimbursement by our draft for invoice amount on your good selves at three months from date of bill of lading, or by cash less rebate at bank rate of discount not to exceed five per cent. for the unexpired term of draft at buyer's option. Documents to be given up in exchange for acceptance."

On October 24, 1922, the plaintiffs sold a further one hundred bales of Sakel Egyptian cotton to Messrs. Winson & Co. The terms of the contract again provide for reimbursement in the same way. Of the one hundred bales agreed to be sold by this last contract only fifty were delivered, and it is only as to the twenty-five bales in the contract of October 13 and fifty bales in the contract of October 24 that any question arises in this action between the plaintiffs and the defendants, the Union Bank of Manchester, Ld.

Having bought the two lots of cotton from the plaintiffs, Messrs. Winson & Co. sold fifty bales to the Tulketh Mill and twenty-five bales to the Ocean Spinning Company.

The bills of lading for the two consignments reached this country some time in November, 1922, and having learnt the dates of the bills of lading, it became desirable for Messrs. Greenhalgh to ascertain how Messrs. Winson & Co. proposed to pay for that which they had purchased. Accordingly they wrote on November 13 a letter advising shipment, and proceeding: "Kindly inform us how you require the reimbursement arranging for your various c.i.f. purchases."

In reply to that letter Messrs. Winson & Co. stated: "It is our intention to accept your drafts for all c.i.f. transactions, unless you can see your way to accept a rebate of five per cent."

The meaning of this correspondence is that unless Winson & Co. could obtain better terms for cash than those arranged for in the contracts, they would insist upon their right under the contracts to pay for the cotton by bills.

Following immediately upon that interchange of letters an interview took place between Mr. Smith, of Winson & Co., and Mr. Lyon, the representative of Messrs. W. P. Greenhalgh & Sons.

The result of that interview is in no doubt. Mr. Lyon's statement as to it is very clear, and Mr. Smith in no way contradicts it, and I find as a fact that in substance the result of that interview was, an agreement was made that Messrs. Winson & Co. should accept bills drawn by Messrs. Greenhalgh & Sons, and that they should pay into the Union Bank of Manchester, Ld., specifically appropriated to meet those bills, bills drawn by them and accepted by the Tulketh Mills and the Ocean Spinning Company in payment for this cotton.

Unfortunately Mr. Smith did not do what he had promised to do—what he led Messrs. Greenhalgh to believe that he would do—and what I think he honestly intended to do in pursuance of his bargain with Mr. Lyon. But through sheer inadvertence, I think, he used printed forms which were quite inappropriate for the purpose he had in view. When, on November 21 and December 5, he paid the Tulketh Mills and Ocean Spinning Company's bills into his bank, instead of saying, either verbally or in writing, "These bills are paid in specifically for the purpose of meeting bills of Messrs. Greenhalgh & Co., accepted by us in payment for 75 bales of cotton marked S.O.K. and S.S. *Armarna* and S.S. *Black Prince*," he filled up forms appropriate to a request to the bank to accept on behalf of Messrs. Winson & Co. certain bills drawn by Messrs. W. P. Greenhalgh & Sons which were said to be coming forward.

The forms he used—which are dated November 21 and December 5—had never been designed for, and were quite inappropriate to effect, a specific appropriation of the proceeds of the bills which were paid in. They had been printed and supplied by the bank to Messrs. Winson for use for quite a different purpose, and they ought not to have been used, and were quite useless for the purpose of carrying out Mr. Smith's arrangement with Mr. Lyon. Equally, they were quite useless

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for the purpose of effecting any transaction which was actually taking place between Winson & Co. and the defendant bank. The first form which was used requested the defendant bank to accept on Messrs. Winson & Co.'s account a bill of Exchange drawn upon the bank by W. P. Greenhalgh of Liverpool against transfer of bill of lading for twenty-five bales of cotton, marked W.C./F.O.K. Tulketh—by steamship *Armarna*. No bill of exchange was drawn, or was to be drawn, by Messrs. W. P. Greenhalgh upon the bank; there was no cotton of the description "Tulketh," and no documents of title were to be taken up by the bank, and there must have come a time, earlier or later, when the officials at the bank knew that inappropriate forms for any transaction which anybody contemplated with regard to this cotton had been used. That time I have not ascertained. It may have been as soon as the bank's responsible officials saw the documents—it may not have been until later—but it is clear, and I find as a fact, that at an interview towards the end of December, between Mr. Smith, of Winson & Co., and Mr. Shanklin, the manager of the defendant bank, the bank learnt—if they had not already discovered—that a mistake had been made, and that it had been intended by Mr. Smith to specifically appropriate the three bills in question to meet bills drawn by Greenhalgh and accepted by them, and not to request the bank to accept bills drawn by Greenhalgh.

Before considering that interview it is necessary to follow the history of the three bills drawn by Winson's and accepted by the Tulketh Mill and Ocean Spinning Company after they were handed by Winson & Co. to the bank on November 21 and December 5 respectively.

They were paid into the bank along with paying-in slips, which were marked in the first case "Bill Provisional, 25 Bales F.O.K. *Armarna*—Credit Winson & Co. Bill Provisional Account"; and in the second case: "Bill Provisional, 50 Bales W.C./F.O.K. *Black Prince*, Credit Winson & Co. Bill Provisional Account." They were entered by the officials of the bank in an account called the "Bills Provisional Account," and they remained in that account until

the dates upon which they became due for payment—namely, February 7 and February 19 respectively.

At this time there were in the books of the bank two, and possibly three, accounts of Messrs. Winson & Co. There was the general account, into which all cash, cheques, drafts and bills to be discounted were entered and from which Messrs. Winson & Co. drew in the ordinary way. There was the bill provisional account, and there was also possibly (although as to this I am not certain) a third account, in which was entered bills which had been paid in, with notice that the proceeds were specifically appropriated to meet specified bills which in due course would be presented to the bank for payment by Messrs. Winson. I say that as to this third suggested account I am not certain, for I am not clear whether any separate account was kept of such bills, or whether they were merely marked in some way so as to show the object with which they were handed to the bank; but it is quite immaterial, for it is clear that if there were such an account, or if such bills were only marked for specific appropriation, they were treated by the bank as being earmarked and their proceeds payable only to honour the specified bills which they were paid in to meet.

I am satisfied that as to the three bills in question, they were not so earmarked by the bank, and that although Mr. Smith intended that they should be, the bank did not appreciate that intention until a later date, which, as I have said, I cannot definitely fix, but which was certainly not later than an interview between Mr. Smith and Mr. Shanklin in December.

The paying-in slips which accompanied these three bills to the bank were marked by Mr. Smith "Bill Provl.," and were entered by the bank in the bill provisional account.

The bill provisional account of Messrs. Winson & Co. at the bank was defined by Mr. Edward Roberts, the chief of the securities department of the bank, as an account to which bills are credited to provide cover for bills accepted by the bank. He further said that it was an account to which bills would be credited which were not to be discounted and so go

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into the general account, but that the bills would be collected at maturity and the proceeds then be transferred to the general account, unless there were special instructions.

I understand from the evidence, and I find as a fact, that the bill provisional account is an entirely distinct account from a customer's general account—that in it are placed bills handed to the bank to meet acceptances which the bank has given, unless there were special instructions for dealing otherwise with particular bills, and that until such bills arrive at maturity they are not to be credited to, or in any way dealt with, as part of the customer's general account, but that when the bills arrive at maturity the bank should either transfer the proceeds of these bills to the general account, or pay them for any particular purpose for which they have been specifically appropriated.

The bills under discussion were credited, and rightly credited, to the bill provisional account. Mr. Smith, by marking the paying-in slips "25 bales F.O.K. *Armarna*," and "50 bales W.C./F.O.K. *Black Prince*," intended to give special instructions that they should be appropriated to Messrs. Greenhalgh's bills, but sending to the bank at the same time the inappropriate forms of request to accept bills, he did not make his intention to appropriate clear to the bank, and they rightly credited them to the bill provisional account, and had no idea that such credit, without the special instruction, was contrary to their customer's intention.

They remained in ignorance of that intention until a date between December 19 and Christmas, and then they learnt at an interview between Mr. Smith and Mr. Shanklin that the intention in paying these bills into the bill provisional account had been, and still was, that they should be specifically appropriated to meet Messrs. Greenhalgh's bills.

The object of that interview was to enable Mr. Smith to obtain the return of those bills to him by the bank. Why he wanted them I do not need to determine. His explanation is not too clear, but I do not need to express the impression left on my mind. He wanted the bills, and he tried to get Mr. Shanklin to let him have them. Whatever his object

was, it became clear to the bank at that interview that whatever language he had used in paying these bills in, and however inapt his expressions had been, he had intended, and he still intended, if the bank retained the bills, that they should be specifically earmarked, so that their proceeds should be paid, and only be paid, to honour the bills drawn by Greenhalgh & Sons which Winson & Co. had accepted to reimburse for the cotton ex-steamship *Armarna* and *Black Prince*, which they had sold again to the Tulketh Mill and the Ocean Shipping Company.

At that time the bills in question were in an account at the bank quite distinct from Winson & Co.'s general account—an account from which they could not be removed until maturity some weeks later and from which their proceeds would then be removed either into Winson's general account or to carry out some specific instruction.

The bank refused to return the bills to Smith. They remained in the bill provisional account until they matured. Before that event Messrs. Greenhalgh had heard some rumours as to Winson & Co.'s financial position, and as the result of an interview which took place in January, after Mr. Smith had had his interview with Mr. Shanklin, Winson & Co. wrote to the plaintiffs on January 12, 1923: "We beg to inform you that against our acceptance of 1125*l.* 17*s.* 4*d.* and 2282*l.* 11*s.* 3*d.* for 25 bales and 50 bales F.O.K. due 7th February, 1923, and 19th February, 1923, which you hold, we specifically paid against them to our bank, the Union Bank of Manchester, Ld., York Street, Manchester, the undermentioned bills: 1176*l.* 18*s.*, Tulketh Spinning Company, Ld.; 1159*l.* 13*s.* 2*d.*, Ocean Spinning Company, Ld.; 1163*l.* 1*s.* 7*d.*, Tulketh Spinning Company, Ld. Yours faithfully, Winson & Co." When the bills were paid on February 7 and 19 respectively, the proceeds thereof were transferred by the bank to the general account of Messrs. Winson & Co., where they were swallowed by a large debit balance awaiting them there, and in due course Messrs. Greenhalgh's bills, which Winson's had promised and intended should be met by those proceeds, were dishonoured.

Messrs. Greenhalgh & Sons then brought their action against

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the bank. The pleadings in the action do not entirely meet the facts as they emerged from the evidence. As sometimes happens, neither party had a very clear and definite view as to the real position until the witnesses had been examined and cross-examined and the documents had been criticized in open Court, and I am strongly of opinion that if the true points at issue are to be determined and real justice is to be done, the pleadings of neither party should be too rigidly adhered to. I am satisfied that neither party is injuriously affected by the form of pleading of the other; neither party was taken by surprise at the trial, and neither party suffered by the facts disclosed by the evidence not having been more specifically or appropriately pleaded, and I am convinced that in this action justice will not be done if either party is strictly tied down to the specific form in which their case was originally stated.

I was not, as far as I can remember, asked to allow any specific amendment by either party, but I am treating this action now as one in which, all the facts being disclosed and all the contentions of law having been made, it is open to me to decide what are the rights of the parties without regard to the particular forms in which these rights were originally claimed or denied. I am not unaware of the case of *Hyams* v. *Stuart King* (1), and if my decision involves something which entails an infringement of the principle of practice therein laid down by Farwell L.J., the Court of Appeal will decide what should be done. In my opinion the parties ought not to be bound by the phraseology of their pleadings, and if I were asked, I should allow any amendment necessary to justify the proper adjustment to-day of the rights of the plaintiffs and the defendants, and I should allow it in the confidence that neither party had suffered either in being unable to meet the supposed new case, or being put to any extra expense in meeting it.

The allegations of the plaintiffs in substance are :—

(1.) That the proceeds of the three spinners' bills were specifically appropriated to meet their bills, and that such appropriation was (*a*) done in pursuance of agreement with

(1) [1908] 2 K. B. 696, 724.

them, and (*b*) that notice of such appropriation had been given to them, and that therefore (*c*) they were entitled to claim the proceeds from the bank as money received to their use, and

(2.) That they were equitable assignees of the proceeds of those bills, and that the bank, taking those proceeds with notice of their claim, could not acquire any legal title to them paramount to the plaintiffs' title.

Many cases, and some text-books, were cited to me as to the law pertinent to these contentions, and I have considered them all. It is not necessary for me to review those authorities, or to endeavour to distinguish those which I think are applicable and those which, in my view, are not. In my opinion the law relating to the contentions raised before me is clear, and is this :—

As to the first contention : If a person making a payment of money (or handing a document or goods, the proceeds of which will become a payment of money) to another, states definitely that such payment is to be used for a particular purpose, and the person to whom it is made does not dissent, he accepts it for the purpose and must use it (unless and until otherwise instructed by the person who makes it to him) on y for the purpose for which he receives it ; and if the purpose for which he receives it is to pay the money to a third party, and that third party to whom he is told to pay it is informed of the fact that the payment has been made and that the payee is instructed to pay it to him, the third party is in law entitled to recover the money from the person into whose hands it has been put as money had and received for his benefit.

As to the second contention : Where two parties have contracted that the money (or the proceeds of something which will ultimately become money) of one in the hands of a third party shall belong to the other, there is an equitable assignment of that money, and such assignment is binding upon any third party (including the holder of the money at the time the bargain is made) who takes that money knowing of the equitable right of the party to whom it has been assigned, and such

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third party can only take it subject to the right of the equitable assignee.

These views as to the law are subject, no doubt, to qualification, but upon these views I proceed to decide this case.

I find as facts, and I base my decision upon the facts, that

(1.) Before Messrs. Greenhalgh & Sons drew the bills of November 4 and 16, 1922, Mr. Smith had promised that he would pay the spinners' bills into the bank specifically charged to meet them, and that Messrs. Greenhalgh would not have parted with the documents of title to their cotton unless they had got such promise.

(2.) When Mr. Smith paid the spinners' bills into the bank he honestly intended to specifically appropriate them to Greenhalgh's bills.

(3.) He did not do so, because he inadvertently used inappropriate forms which did not, at the time they received them, inform the bank of his intention.

(4.) The bank on receiving the bills did not pay them into Winson's general account in which, at their discount value, they would be available for Winson's or their creditors, but paid them into the bill provisional account in which they could not be dealt with in any way until maturity, and then only if no special instructions had been given with regard to them.

(5.) Before the bills reached maturity the bank knew that Messrs. Winson & Co.'s agent (Smith) had handed them to the bank with the intention of appropriating them to meet Greenhalgh's bills, for the bank learnt at the interview in December that Smith had promised Greenhalgh to pay these bills in to meet their bills.

(6.) After the bank knew in December that the bills had been given to them to be specifically appropriated to meet the plaintiffs' bills they took no steps to rectify the position, although they must have known that Greenhalgh must then have regarded them as holding the proceeds to their use; they did nothing; but they left Winson's in the position of being able to write the letter to Greenhalgh of January 12.

(7.) Knowing of Greenhalgh's interest in this matter, knowing that Smith had promised to specifically appropriate

the proceeds of the bills in the hands of the bank for Greenhalgh's benefit, the bank on February 7 and 19 received the proceeds of the three spinners' bills and paid those proceeds into the general account of Messrs. Winson & Co., in which, as I have said, they were promptly swallowed by a large overdraft.

Having regard to these facts, and applying the law as I conceive it to be, I am of opinion that the bank having on November 21 and December 5 received these three bills without any definite instructions as to appropriation to particular bills, credited them to the bill provisional account. Whilst they were in that account the bank had full information as to the payers' intention as to their ultimate destination. Whilst they were still in that account, the bank also knew of the bargain which had been made between Winson's and Greenhalgh, but that notwithstanding the bank transferred the proceeds to the general account, knowing that Winson's had all along intended they should be specifically appropriated to Greenhalgh's bills and knowing that Winson's had so promised Greenhalgh.

Upon these facts and in my view of the law I have come to the conclusions :—

(1.) There was an equitable assignment of the proceeds of the spinners' bills by Winson & Co. to Messrs. Greenhalgh before they paid the spinners' bills into the bank.

(2.) Before the bank paid the proceeds of the spinners' bills into the general account they knew of the arrangement between Smith and Lyon, and that therefore they paid that money into the general account subject to that equitable assignment.

(3.) That in December the bank knew that Winson & Co. were claiming to appropriate the proceeds of these bills to meet Greenhalgh's bills, and that they should then have claimed the right to have already appropriated themselves, which they did not do, or should have returned the bills to Winson & Co., which they refused to do, or they must be taken to have assented then to Messrs. Winson's appropriation.

These findings would in my view have finally disposed of this action were it not for a very lucid and valuable argument

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addressed to me by Mr. Laski. That argument was addressed to the question as to whether a banker, having two accounts open for a customer, and having bills appropriated to one, was entitled to transfer their proceeds to the other without the customer's permission and even against his wishes. Mr. Laski contended, in substance, that the relation of banker and customer entitled the banker to deal with both accounts as being one whole and entirely under his control, he alleging that he had a lien over all assets, so that he might remove assets from the one account to meet deficiencies in the other. I cannot accept this proposition. If a banker agrees with his customer to open two or more accounts, he has not, in my opinion, without the assent of the customer, any right to move either assets or liabilities from the one account to the other; the very basis of his agreement with his customer is that the two accounts shall be kept separate, and if the customer pays bills drawn upon him not into his general account, where they will be discounted and he will receive the benefit of being able to draw against them, but into an account in which they will only be used either to pay bills accepted by the bank or bills drawn by the customer which they are specifically to meet, I do not think a banker, any more than any other individual, can change them from the one account into the other without the customer's assent. On this point it seems to me that the only question to be decided is, what is the agreement between the banker and the customer? and if that agreement is, as I find it to be in this case, that there shall be a general account into which bills are paid as cash and that there shall be an account into which bills shall be paid for some other purpose, bills or their proceeds cannot be moved from one account to the other at the whim of the banker without the consent, express or implied, of the customer. Mr. Laski in terms admitted that a banker could have no lien over assets of which there was a specific appropriation. I think equally there can be none if the bills are specifically appropriated to a special account, which has to be dealt with in a particular way.

Having regard to all the arguments addressed to me and the evidence adduced, I am of opinion that the bank, having

received these bills without notice of any specific appropriation, paid them into the bill provisional account, which was a quite separate and distinct account from Winson's general account; that the bank knew before they paid the proceeds into the general account of the claims of Messrs. Greenhalgh and of the desire of Messrs. Winson to appropriate the proceeds of these bills to Messrs. Greenhalgh's claim, and that the bank received the proceeds of these bills with notice of Messrs. Greenhalgh's claim and with notice, which they did not repudiate, of Messrs. Winson's intention to appropriate the proceeds of these bills to meet that claim.

I find therefore that before the bank paid the proceeds of these bills into Winson's general account they had received notice of specific appropriation and of an equitable assignment of those proceeds, and I therefore give judgment for the plaintiffs for the amount claimed, with costs.

Solicitors for the plaintiffs: *Grundy, Kershaw, Samson & Co., Manchester.*

Solicitors for the defendants: *Tatham, Worthington & Co., Manchester.*

F. C.

1923
Oct. 26.

PEYRAE *v.* WILKINSON AND ANOTHER.

[1923. P. 502.]

Debt—Goods sold and delivered—Payment—Foreign Currency—Rate of Exchange—Judgment—Proper Date for Conversion into English Currency.

In an action in this country for a debt payable in a foreign currency the debt must be converted into English currency at the rate of exchange prevailing at the date when the debt became due and payable and not at the rate of exchange prevailing at the date of judgment.

Uellendahl v. *Pankhurst, Wright & Co.* [1923] W. N. 224 followed.

Cohn v. *Boulken* (1920) 36 Times L. R. 767 not followed.

ACTION tried before Bailhache J.

The action was brought by the plaintiff to recover the balance of the price of goods sold and delivered. The defendants in October, 1921, agreed to purchase certain goods of the plaintiff, who carried on business at Lyons, France, for 10,630 francs, subject to certain discounts. The goods ought to have been paid for, as the judge found, on December 10, 1921. The defendants, on April 7, 1922, paid 50*l.*, which, at the rate of 48 francs to the pound, represented 2400 francs. The plaintiff now sued to recover the balance of 8017 francs. The question for the Court was whether in converting that sum into English currency the rate of exchange current when the price of the goods was due and payable—namely, December 10, 1921—should prevail or whether the rate of exchange should be taken as at the date of judgment in the action. Between those two dates the value of francs reckoned in sterling had fallen considerably.

du Parcq for the plaintiff.

W. T. Monckton for the defendants. Inasmuch as the debt existed as a debt in francs before the judgment the francs ought to be converted into English currency according to the rate of exchange current on the date of judgment. Acton J. had so held in *Cohn* v. *Boulken* (1), following the decision in *Scott* v. *Bevan* (2), but Rowlatt J. had held in *Uellendahl* v. *Pankhurst, Wright & Co.* (3) that the same rule

(1) 36 Times L. R. 767. (2) (1831) 2 B. & Ad. 78.
(3) [1923] W. N. 224

ought to be applied as in actions for damages for tort or breach of contract—namely, that the debt ought to be converted into English currency at the rate of exchange current at the date when payment ought to have been made. Atkin L.J. expressed a view in *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (1) which supported the defendants' contention.

BAILHACHE J. I need not trouble you, Mr. du Parcq. I think that you are right on the first point on the facts and that there was no agreement for a rebate. With regard to the date at which the rate of exchange ought to be taken it is clear that in actions for damages for breach of contract the rate of exchange current at the date of the breach has to be taken in calculating the damages payable in English currency, but Mr. Monckton has put forward an ingenious argument—namely, that in an action for debt for goods sold and delivered the rate of exchange current at the date of judgment ought to be taken for the purposes of the conversion of the debt into English currency and not the rate of exchange current at the date of payment, as the debt exists in francs until it is converted into sterling. Although there is something to be said for that contention, I cannot see any real difference between an action for debt and an action for damages for breach of contract as to the date when the debt or damages ought to be converted into English currency. Atkin L.J. in *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (2) said: "But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the Courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve." I gather

(1) [1922] 1 K. B. 451, 465. (2) [1922] 1 K. B. 465.

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from that passage that at that date Atkin L.J. had not made up his mind that the date of calculating the rate of exchange in cases of actions for debt should be the same as in the case of actions for damages for breach of contract. Rowlatt J., in *Uellendahl* v. *Pankhurst, Wright & Co.* (1), has decided the question in one way, and Acton J., in *Cohn* v. *Boulken* (2), has decided the question in the other way. It is, however, very important that the rule as to the date for calculating the rate of exchange in the case of actions for debt should be certain. I therefore propose to follow the decision of Rowlatt J., and to hold that the debt must be converted at the rate of exchange current at the date when the debt became due and payable.

Judgment for plaintiff.

Solicitors for plaintiff: *Aylett & Gotto.*

Solicitors for defendants: *Trotter, Goodhall & Patteson.*

R. F. S.

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March 27.

HARTLAND *v.* DIGGINES (INSPECTOR OF TAXES).

Revenue—Income Tax—Voluntary Payment of Salary without Deduction of Income Tax—Basis of Assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E.*

A shipping company voluntarily paid the income tax on the salary of their accountant:—

Held, that the amount of this payment must be added to the salary of the accountant in order to ascertain his income for income tax purposes.

CASE stated under s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), by the Commissioners of Income Tax on Public Offices or Employments of Profit in the City of London.

At a meeting of the above Commissioners held on June 13, 1921, the appellant, Harry Hartland, of 138 Leadenhall Street, appealed against an assessment to income tax made upon him under Sch. E for the year ending April 5, 1919. The

(1) [1923] W. N. 224. (2) 36 Times L. R. 767.

appellant was throughout the year of assessment in the employ as their accountant of the New Zealand Shipping Co., Ld. (hereinafter called "the company"). The assessment appealed against included, in addition to the appellant's salary of 500*l.*, a further sum of 80*l.* 5*s.*, arrived at in the following way. It had been the custom of the company since 1912 to pay every year the income tax in respect of the salaries of all its employees, including the appellant, and for the year of assessment the amount so paid was included in the working accounts of the company under the heading "income tax staff," and had been allowed as a trade expense and deducted in arriving at the profits of the company for the year of assessment. The sum of 80*l.* 5*s.* was the sum so paid by the company in respect of the salary of the appellant. The company entered into no agreement either verbally or in writing with the appellant as to the payment of income tax, but the company had in fact paid the income tax in respect of the appellant's salary since 1912.

It was argued for the appellant that the payment was not a money payment or a payment convertible into money, and formed no part of his salary or income and was therefore not assessable under the rules applicable to Sch. E.

For the respondent it was contended that the income tax paid by the company was paid on behalf of the appellant in respect of the appellant's salary and was income of the appellant, even if the payment was voluntary, and that it was income that came to him by virtue of his office.

The Commissioners confirmed the assessment, but stated this case.

There was no question of figures, the only question for the Court being whether, in arriving at the assessment appealed against, there had been rightly included the sum of 80*l.* 5*s.* above referred to.

Latter K.C. and *Edwardes Jones* for the appellant. The decision of the Commissioners was wrong. In *North British Ry. Co.* v. *Scott* (1), where the railway company paid the

(1) [1923] A. C. 37.

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income tax of an employee, the amount thereof was held to be part of the employee's income. But in that case the payment was made in virtue of their contract with the employee, not, as in the present case, voluntarily. The company here made the appellant a present which they can at any time cease to make. The test is that applied in *Tennant* v. *Smith* (1) —namely, is it something that can be regarded as money's worth? In that case the value of the occupation of bank premises by the appellant, rent free, was held not to be part of his income, though in fact it did represent a money value to him: see also *M'Dougal* v. *Sutherland*. (2) In *Cooper* v. *Blakiston* (3), in which Easter offerings were held to be part of the income of the recipient, the offerings were made in response to a circular which, in effect, stated that they were intended to supplement income. This payment of income tax was not a "perquisite" within the meaning of r. 1 of the Rules to Sch. E as defined in r. 4, para. 3, as "such profits as arise in the course of exercising an office or employment from fees or other emoluments." This only refers to perquisites by contract.

Sir Henry Slesser S.-G. and *R. P. Hills* for the respondent. The question is whether the fact that the payment in this case was not made under a contract sufficiently distinguishes it from *North British Ry. Co.* v. *Scott*. (4) It is submitted that it does not. "It is now well settled that a voluntary payment, if it accrues to a person by reason of an office or employment held by him, is a profit within the meaning of the Schedule": Lord Sterndale M.R. in *Cowan* v. *Seymour*. (5) This payment was clearly made to the respondent by reason of his employment as accountant and would not have been paid at all had he not been so employed, and the 80*l.* 5*s.* was part of his salary: per the Lord President (Lord Clyde) in the Court below in *North British Ry. Co.* v. *Scott*. (6) Rule 1 of the Rules to Sch. E in speaking of "perquisites" seems to envisage the case of payments made not under contract. *Cooper* v.

(1) [1892] A. C. 150.
(2) (1894) 21 R. 753.
(3) [1907] 2 K. B. 688.
(4) [1923] A. C. 37.
(5) [1920] 1 K. B. 500, 507.
(6) 1922 S. C. 247, 250.

Blakiston (1), the Easter offerings case, is in point. The case finds that the 80*l.* 5*s.* was included in the working accounts of the company under the heading "income tax staff," and presumably it would have been dealt with in the same way if paid under contract.

It is arguable that a contract to pay can be inferred from the fact of payment since 1912.

[*M'Donald* v. *Shand* (2) was also referred to.]

Latter K.C. in reply. The mere fact that a voluntary gift—e.g., a Christmas present—is made every year does not raise an inference of a contract to make it. In *M'Donald* v. *Shand* (2) the commissions were paid under contract.

ROWLATT J. This case is stated upon the question whether the appellant is liable to income tax upon the footing of a larger sum than the sum received by him in cash from his employers, the excess being the sum of 80*l.* 5*s.*, which the New Zealand Shipping Co., his employers, paid as income tax on his salary of 500*l.* It appears very arguable that this appellant ought to have been assessed under Sch. D, and not under Sch. E., in which case he would have gone before a different set of Commissioners. But that point was not raised before me.

The first contention indicated in the argument on behalf of the appellant was that this payment was not money's worth, and the case of *Tennant* v. *Smith* (3), the bank manager's residential quarters case, was glanced at. But I feel no difficulty about that point. This was money's worth as much as was the income tax paid for the employee in *North British Ry. Co.* v. *Scott* (4) which, for this purpose, cannot be distinguished from the present case.

The simple question is whether this sum is an emolument accrued to the appellant in virtue of his office within the meaning of Sch. E. In the recent case in the House of Lords, *North British Ry. Co.* v. *Scott* (4), the respondent, a railway officer, had by contract a salary to be paid free of tax, and

(1) [1907] 2 K. B. 688.
(2) [1923] A. C. 337.
(3) [1892] A. C. 150.
(4) [1923] A. C. 37.

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it was held that the effect of that was that his real salary was the aggregate of the sum which was expressed to be payable to him as salary free of tax, and the amount of the tax. I should have thought that was extremely clear. In the present case there is no contract. When I look at *North British Ry. Co.* v. *Scott* (1) I do not think it touches this point. It is not right to say, as did counsel for the appellant, that the argument in that case did not proceed upon the basis that there was a contract, because it started from that basis. On the other hand, I cannot accept what the Solicitor-General said—namely, that it is quite clear that the House of Lords intended to decide this point as well as the point immediately before them. I do not believe they did, and I think the point is not covered by any decision. The question is whether this is a payment in respect of the employment of the appellant. I must hold that it is. It would be giving quite a wrong value to the facts if I were to look upon this as being in the same position as a payment made by a charitable friend to another because he had a small salary and a large family, and I cannot possibly look upon the facts in that light. I must look upon this payment as an emolument given to the appellant in his position as an officer of the company, and in these circumstances all difficulty disappears. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Thomas Eggar & Son.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1923] A. C. 37.

W. L. L. B.

WILLIAMSON *v.* PALLANT.

1924
April 1.

Landlord and Tenant—Rent Restriction—Recovery of Possession of Dwelling House for Occupation of Landlord—Order for Possession—Matters to be taken into consideration in deciding whether reasonable to make Order—Financial Hardship to Tenant if Order made—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 1 (*d*) *—Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4.

By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . . (*d*) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . . and in any such case as aforesaid, the Court considers it reasonable to make such an order or give such judgment":—

Held, that in considering whether it is reasonable to make an order for possession under s. 5, sub-s. 1 (*d*), of the Rent Restriction Act, 1920, as amended by s. 4 of the Rent Restriction Act, 1923, the county court judge ought to take into consideration every circumstance that may affect the interests of the landlord or of the tenant in the premises, including the financial hardship which may be inflicted upon the tenant if an order for possession is made.

APPEAL from Bristol County Court.

The plaintiff, Mrs. Williamson, was the owner of two houses, Nos. 53 and 68 Greenbank Road, Bristol. She resided with her husband and son at No. 53, which contained three bedrooms, two living rooms, and a kitchen.

The defendant, George Pallant, became the tenant of No. 68 in 1916, and in 1917 the plaintiff let the house to the defendant on a lease for five years, and after the expiration of the lease the defendant continued to reside there at a weekly rent of 12*s.* 9*d.* The house contained a shop, one stockroom, four bedrooms, one living room, and a scullery; there were also stables and a yard at the back. The defendant's wife carried on a general grocery business, and his son carried on a greengrocery business on the premises. A coal round was also carried on. When the defendant and his family went to live at No. 68 in 1916 they took over a practically worthless business. Since then they had worked up a very good business,

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which was the main source of their income, as the defendant, who was a semi-invalid, did not earn more than 1*l.* per week.

In 1921 the plaintiff's husband became an absolute invalid, and had to give up work. The plaintiff's main source of income was thereafter derived from the rent of No. 68 and of another house in the road which she owned. The plaintiff desired to obtain possession of No. 68 in order that she might occupy it as a residence for herself and also carry on a grocery business there for which the premises were adapted. She accordingly brought an action in the county court against the defendant in which she claimed possession of the premises.

The defendant objected to give up possession on the ground that he would suffer serious financial loss if he were turned out of the shop, as his living would be gone owing to the difficulty of obtaining a shop elsewhere.

The county court judge on December 18, 1923, held that the plaintiff bona fide and reasonably desired to obtain possession of No. 68 for a residence for herself, and that in considering whether it was reasonable to make the order for possession he could not take into consideration the financial hardship which would be inflicted upon the tenant if he were compelled to quit the house. He accordingly made an order for possession to be given on June 24, 1924.

The defendant appealed.

Croom-Johnson for the defendant. The county court judge was wrong in refusing to take into consideration the financial hardship that would be caused to the tenant in having to give up possession of the premises if an order for possession were made. Whether or not it is reasonable to make an order for possession depends upon all the circumstances of the case. In the present case the county court judge has taken into consideration only half the circumstances—namely, those affecting the landlord, he has left out of account the circumstances that affect the interest of the tenant in the premises. The financial hardship which would be caused to the tenant through having to give up possession of the premises is as much a factor to be taken into consideration by the county

court judge, in deciding whether it is reasonable that an order for possession should be made, as any other circumstance. Sect. 5, sub-s. 1 (*d*), of the Rent Restriction Act, 1920, as amended by s. 4 of the Rent Restriction Act, 1923, was never intended to apply to such a case as the present one; it was only intended to apply to a case when the landlord had nowhere to go to except the house in the occupation of his tenant.

Wethered for the plaintiff. The county court judge was right in refusing to take into consideration the financial hardship that would be caused to the tenant if an order for possession was made. It is sought to use the Rent Restriction Acts for a purpose which was never intended—namely, to protect the interest of the tenant in the goodwill of his business. The Rent Restriction Acts were never intended to give a value to the goodwill of a tenant's business. In applying for an order for possession a landlord has to prove one of the conditions set out in s. 5, sub-s. 1, of the Rent Restriction Act, 1920. In the present case the landlord proved that she required the house for her own occupation. The county court judge has then to consider whether it is reasonable to make an order for possession. The only factors that the county court judge can take into consideration in deciding that question are circumstances relevant to the residential qualification of the house and not outside factors. Premises are only protected by the Rent Restriction Acts when used as a residence; they are not protected in so far as they are used as business premises.

SWIFT J. In this case the plaintiff, Mrs. Williamson, sought in the Bristol County Court to recover the possession of certain premises, No. 68 Greenbank Road, Bristol, of which the defendant, Pallant, was the tenant. The claim for possession was made under s. 5, sub-s. 1 (*d*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, alleging that the dwelling house was "reasonably required" by the plaintiff "for occupation as a residence" for herself. The county court judge found, on the facts

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before him, that the house was " reasonably required " by her for her occupation as a dwelling house.

The section under which the application for possession was made provides that even if one or more of the conditions under which an order for possession may be made exists, still such an order shall not be made unless the Court considers it reasonable to make such an order or give such judgment, and the question which arises in this case is: what ought the learned county court judge to consider or what ought he not to consider when, having determined that some one or more of the conditions upon which an order for possession may be made exists, he has to determine whether it is reasonable to make an order for possession or to give a judgment to the like effect? In my view he ought to consider and give proper weight (but no more than proper weight) to every circumstance which affects the interest of either the landlord or the tenant in the premises which are the subject matter of the action. I say nothing at all as to the weight any particular fact may have on his judgment. But it seems to me that any fact which has any bearing on the question as to whether or not he should make an order, ought to be considered by him. I can hardly conceive any circumstance which affects the relationship of the tenant to the premises which is not a proper circumstance for him to consider.

In this particular case the tenant of these premises, Mr. Pallant, was carrying on there, with the help of his wife and son, a greengrocery business and a coal business, and it was urged by the wife in her evidence, and by the solicitor who appeared for the defendant before the county court judge, that it would be a great hardship upon the tenant and his family if they were sent away from these premises where they had carried on business for a considerable time and built up a valuable goodwill. I entirely agree with Mr. Wethered's contention that the Rent Restriction Acts of 1920 and 1923 must not be converted into a means of establishing a value for the goodwill of a business. But, on the other hand, I cannot see how it can be said that the fact that financial hardship would be caused to a tenant if he had to leave the premises is

not a circumstance affecting his interest in the premises which ought to be considered by the county court judge. It is admitted that if a tenant can give evidence and satisfy the judge that injury to his health might result from an order being made, or that some pecuniary loss, other than the loss of the goodwill, might directly flow from his being turned out, the county court judge is entitled to consider those things in making up his mind whether, on the whole, it is reasonable to make an order. But it is said that the county court judge must not consider the financial loss which might be caused to the tenant from the loss of the goodwill of the business. I do not say what weight ought to be given to such a consideration, or in what form that weight ought to express itself. It may be that it would simply express itself by giving the tenant—as it is suggested that the county court judge did in this case—a little longer time than he otherwise would have, in order that he might make arrangements for the transfer of his business to some other place, or in some way or other to alleviate for himself the hardship which immediate ejectment might cause. But whatever weight is to be given to the fact of financial loss to the tenant by reason of the loss of business, and in whatever form that is to be expressed by the order of the Court, it seems to me to be plain that it is a circumstance which the county court judge is at liberty to take into consideration and, indeed, which he ought to take into consideration. In this case, the county court judge gave a most careful judgment, in which he says: "I am asked to give effect to a factor which I think is irrelevant—namely, the financial hardship which would be inflicted upon the tenant if he be compelled to quit the house. If I were entitled to consider this factor, I think probably my judgment would be different. But I think I ought not to consider it." In my opinion the county court judge went wrong in law in refusing to take that factor into consideration. I do not think that there is anything to be found in the Rent Restriction Acts which says that any particular factor is to be excluded from consideration by the county court judge when he is deciding whether or not it is reasonable to make an order for possession.

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I think he must take into account all the circumstances affecting the interest of the tenant as well as the interest of the landlord in the premises, and, amongst others, he must take into account the circumstance of the financial hardship which might be inflicted upon one party or upon the other if the order for possession were made. In this case he has expressly stated that he did not do that. I think the case must go back to him, but not with any suggestion from us that in the result he will make any different order from that which he has made. It may be that in making the order for possession on June 24, which he did make, he really was taking into consideration this question and was giving proper, full and legitimate effect to the factor of financial hardship. That I do not know. But in his judgment he said in terms that he did not consider that factor. It may be that when he does give it consideration he may come to the conclusion that it ought to have no weight at all, or very little weight. On the other hand he may come to the conclusion that it should have such weight that it would not be reasonable to make any order at all, or it may be that he will think, when he reconsiders the matter, that although he expressly stated that he was not considering the question of financial hardship, and although he thought that in law he was not entitled to take it into consideration, nevertheless in fact he did give effect to it by postponing the operation of the order for possession until June 24, and thereby mitigated the hardship which he thought was being done to the person whom his order was going to dispossess. I think the matter must go back for the county court judge to rehear and to consider the whole of the circumstances affecting these parties in relation to this house, and amongst other things, to consider any financial hardship, of which evidence is given, which might result to the defendant if an order for possession is made.

ACTON J. I agree.

Appeal allowed.

New trial ordered.

Solicitor for plaintiff: *E. J. Watson, Bristol.*

Solicitors for defendant: *Malkin & Co., for R. E. Pullen, Bristol.*

R. F. S.

HAWES, APPELLANT *v.* STEPHENS, RESPONDENT.

1924
May 1.

Margarine—Sale by retail—Printed Matter on Wrapper—"Fancy or other descriptive name"—"Churned with fresh Milk"—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 6—*Butter and Margarine Act*, 1907 (7 *Edw.* 7, *c.* 21), *s.* 8.

By s. 6 of the Sale of Food and Drugs Act, 1899, no other printed matter shall appear on the outside wrapper in which margarine is sold than the word "margarine."

Sect. 8 of the Butter and Margarine Act, 1907, makes it an offence for any person dealing in margarine to describe it in any wrapper, etc., by any name other than the word "margarine" alone or the word "margarine" in combination with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries.

Margarine was sold wrapped in two wrappers. The outside wrapper had the word "margarine" printed thereon, and the inside wrapper had the words "Kernut margarine churned with fresh milk" printed thereon. The word "Kernut" had been approved by the Board of Agriculture and Fisheries for use in combination with the word "margarine." The magistrate convicted the vendor of an offence under s. 8 of the Butter and Margarine Act, 1907, on the ground that the words "churned with fresh milk" were associated with the words "Kernut margarine" so as to constitute part of the fancy or descriptive name of the article sold:—

Held, quashing the conviction, that the words "churned with fresh milk" were merely descriptive of the process of manufacture of the article sold and did not form part of the fancy or descriptive name under which it was sold.

Maypole Dairy Co. v. *Patterson* 1923 S. C. (J.) 85 distinguished.

CASE stated by a metropolitan police magistrate.

The appellant was summoned at the Clerkenwell Police Court at the instance of the respondent for that he on September 28, 1923, being a person dealing in margarine, did in a wrapper enclosing margarine describe it by a name other than "margarine," or a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries contrary to s. 8 of the Butter and Margarine Act, 1907. (1)

(1) Sale of Food and Drugs Act, 1899, s. 6, sub-s. 2: "The letters required to be printed on the paper wrapper in which margarine or margarine-cheese is sold shall be capital block letters not less than half an inch long and distinctly legible, and no other printed matter shall appear on the wrapper."

Butter and Margarine Act, 1907, s. 8: "If in any wrapper enclosing margarine, or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine a person dealing in margarine describes it by any name other than either 'margarine,' or a

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Upon the hearing of the summons on November 8 and 14, 1923, the following facts were proved or admitted.

The appellant was a grocer carrying on business at 88 St. James Road, Holloway, in the County of London.

On September 28, 1923, the respondent entered the appellant's shop and asked to be supplied with 1 lb. of Kernut margarine. The appellant supplied him with an article which was wrapped in two wrappers. The outside wrapper had the word "Margarine" printed thereon in one-half-inch block letters. The inner wrapper had the following words printed thereon: "Kernut Margarine, churned with fresh milk." The words "Kernut Margarine" were printed in two lines in capital block letters, and the words "churned with fresh milk" were printed below in smaller letters in a separate line. The respondent understood that he was getting a brand of margarine called "Kernut Margarine."

The respondent submitted a sample to a public analyst for analysis, who certified that the sample contained 100 per cent. of margarine as defined by s. 13 of the Butter and Margarine Act, 1907, as it contained 94 per cent. of fat other than butter-fat and 6 per cent. of butter-fat.

The Board of Agriculture and Fisheries on May 14, 1913, by virtue of the powers conferred upon them by s. 8 of the Butter and Margarine Act, 1907, approved the use in connection with margarine of the name "Kernut" in combination with the word "margarine."

It was admitted that in the process of preparation the margarine sold by the appellant was churned with fresh milk.

It was contended on behalf of the respondent that the word "Kernut" was a fancy name approved by the Board of Agriculture and Fisheries to be used in conjunction with the word "margarine," but that the appellant was limited to that word, and the additional words "churned with fresh milk" formed part of the descriptive name, and contravened the provisions of s. 8 of the Butter and Margarine Act, 1907.

name combining the word 'margarine' with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word 'margarine,' he shall be guilty of an offence under this Act."

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On behalf of the appellant it was submitted that the words "churned with fresh milk" did not form any part of the descriptive name of the article, but were a mere intimation to purchasers of the method adopted in the preparation of the article, and had no relation to the approved name which the manufacturer had bestowed on this particular brand of margarine.

The attention of the magistrate was directed to the case of *Maypole Dairy Co.* v. *Patterson* (1), which was before the High Court of Justiciary on July 18, 1923. The magistrate came to the conclusion that the case before him was indistinguishable from the Scottish case, and considered himself bound by the decision of the High Court of Justiciary. In that view he held that the words "churned with fresh milk" were associated with "Kernut Margarine" so as to constitute part of the fancy or descriptive name of the article sold, and he therefore convicted the appellant of the offence charged.

The question for the opinion of the Court was whether upon the facts stated the magistrate was right in so holding or whether he ought to have dismissed the summons.

Barrington-Ward K.C. (*Frampton* and *Glyn-Jones* with him) for the appellant. The magistrate was wrong in holding that the words "churned with fresh milk" formed part of the fancy or descriptive name of the article sold. The only offence charged was under s. 8 of the Butter and Margarine Act, 1907. That section is aimed at the unauthorized use of any name other than "margarine" or the name "margarine" combined with a lawfully approved fancy or descriptive name; it does not say "any words." The words "churned with fresh milk" are not part of the name; they are merely descriptive of the process adopted in the manufacture of the article sold. Sect. 8 not only relates to wrappers enclosing margarine but also to advertisements and invoices; therefore, if the decision of the magistrate is right it would follow that a vendor could not puff his goods on his invoices, or proclaim their value to the world, because he must not refer to it in any other way than by the name

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" margarine " or " margarine " combined with an approved fancy name. In *Maypole Dairy Co.* v. *Patterson* (1), by which case the magistrate considered himself bound, the words used were "Mayco Margarine mixed with Maypole butter," and it was held that the words " mixed with Maypole butter " formed part of a descriptive name which had not been approved by the Board of Agriculture and Fisheries, and that accordingly an offence had been committed against s. 8 of the Act of 1907. Whether or not that case was rightly decided it is clearly distinguishable from the present case, because the words there used are very different from those used in the present case. One of the mischiefs against which the statute was aimed is that of passing off margarine as butter, and therefore the use of any words which might reasonably tend to suggest that the article sold, though called margarine, was really to a great extent butter, would be doing what the Act was intended to prevent. Under s. 6 of the Sale of Food and Drugs Act, 1899, no other printed matter may appear on the outer wrapper except the word " margarine " in capital block letters, but there is nothing to prevent the use on the inner wrapper of words which do not form part of the name, but are merely words of commendation or describe the origin or process of manufacture of the article sold. It was held in *Williams* v. *Baker* (2) that s. 6 of the Sale of Food and Drugs Act, 1899, was not repealed by s. 8 of the Act of 1907, and that therefore it was an offence to sell margarine in a wrapper on which were printed the words " Karmo Margarine." It was also held in *Millard* v. *Allwood* (3) that if the outer wrapper is transparent so that the name on the inner wrapper show through it the inner wrapper may be treated as being the outer wrapper. Neither of those cases touch the present case, as the appellant complied with the law in that respect. Sect. 8 of the Act of 1907 is a penal section, and therefore ought to be construed strictly.

Roland Burrows for the respondent. The intention of the

(1) 1923 S. C. (J.) 85. (2) [1911] 1 K. B. 566.
(3) [1912] 1 K. B. 590.

Legislature was that all butter substitutes, whether they contained a mixture of butter or not, should be included in the term "margarine." There is no such thing as margarine with a difference. The history of the legislation with regard to the matter is clearly set out in Mr. McCardie's argument in *Millard* v. *Allwood*. (1) The successive provisions in the various Acts were made for the purpose of protecting the public, so that margarine should be sold as margarine and not as an equivalent of butter. Sect. 8 of the Act of 1907 provides that in a package containing margarine the margarine can only be described by the name "margarine" pure and simple, or by a name combining the word "margarine" with a fancy or descriptive name approved by the Board of Agriculture and Fisheries.

[LORD HEWART C.J. What is there in s. 8 to prevent the addition to the name of words of encomium, or words indicative of origin, or words stating the price ?]

There is no prohibition on the seller of margarine putting on an inside wrapper or on a label, invoice or advertisement words which are not forbidden by s. 8. If the approval of the Board of Agriculture and Fisheries for the use of the words "churned with fresh milk" as forming part of a name had been sought the Board would have had to refuse to sanction their use, because s. 10 of the Act of 1907 provides that: "A name shall not be approved by the Board of Agriculture and Fisheries for use in connection with margarine if it refers to or is suggestive of butter or anything connected with the dairy interest." The use of the words "churned with fresh milk" is contrary to the spirit of the Act, as they would suggest to any one butter, because milk is the substance out of which butter is made, and it is forbidden to suggest that margarine is equivalent to butter. The words "churned with fresh milk" are a description or form part of the description of the article which is being sold, the purchaser is informed that he is buying not merely "Kernut Margarine" but "Kernut Margarine churned with fresh milk," and that that is the

(1) [1912] 1 K. B. 595.

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name under which it is sold. In *Maypole Dairy Co.* v. *Patterson* (1) the Dairy Company were convicted of an offence under s. 8 on the ground that the words "Mayco Margarine mixed with Maypole butter" constituted together a descriptive name of the article. It is true that the magistrate was not bound by the decision in that case, but the expression "mixed with Maypole butter" used in that case is indistinguishable from the expression "churned with fresh milk" used in the present case, and the reasoning which led to the decision in that case ought to be applied here.

LORD HEWART C.J. This case turns on a short point which is not really one of any great difficulty. The appellant was summoned in November, 1923, at the instance of the respondent for that he, "being a person dealing in margarine, did in a wrapper enclosing margarine describe it by a name other than 'margarine,' or a name combining the word 'margarine' with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries contrary to s. 8 of the Butter and Margarine Act, 1907." It appears from the case that the only question raised before the magistrate was whether the words "churned with fresh milk" did or did not form part of the descriptive name of what was being sold so that the whole expression "Kernut Margarine churned with fresh milk" amounted to a fancy or other descriptive name for the commodity which was being sold. The magistrate refers to *Maypole Dairy Co.* v. *Patterson* (1), and says: "I came to the conclusion that the case before me was indistinguishable from the Scottish case, and considered myself bound by the decision of the High Court of Justiciary. In this view I held that the words 'churned with fresh milk' were associated with the words 'Kernut Margarine' so as to constitute part of the fancy or descriptive name of the article sold, and I therefore convicted the appellant."

The question raised by the case is whether he ought to have dismissed the summons. It is a commonplace to say

(1) 1923 S. C. (J.) 85.

that a decision must be looked at in relation to the particular facts upon which it turns; but if there is one case more than another in which that proposition is obviously true, it is, one would think, a case where the question is whether a particular set of words does or does not constitute part of a fancy or other descriptive name—a question which must manifestly depend upon the very words that are complained of. In *Maypole Dairy Co.* v. *Patterson* (1) the words were "Mayco Margarine mixed with Maypole butter." The words which are complained of in the present case are quite different words, and there can be no doubt that the magistrate made a mistake in law in thinking that the case before him was indistinguishable from the Scottish case, and that he was bound by the decision of the Scottish case. It appears from the way in which he has stated the case that he came to the conclusion to which he did because he thought that the two cases were indistinguishable, and that he was bound by that decision. It is suggested by Mr. Roland Burrows in his ingenious argument that, although it may be true to say that the magistrate was wrong in the view which he took, he ought not to have dismissed the summons. Speaking for myself, I think that the answer to the twofold question is, first, that he was wrong in the view that he took; and secondly, that he ought to have dismissed the summons, inasmuch as the words referred to do not form part of a fancy or other descriptive name forbidden by law. The substance of Mr. Roland Burrows' argument appears to me to be really this: that when one looks at the words of this statute, which forbid among other things the use of a name connected with the dairy business, it was contrary to the spirit of the Act to use descriptive words containing the word "milk" in any sort of relation to margarine, even though they do not form part of a fancy or descriptive name. He says that if any such words had been submitted to the Board of Agriculture and Fisheries for approval as part of a descriptive name it would have been the duty of the Board to refuse to approve them. That really amounts to saying that although words may be used, not as

(1) 1923 S. C. (J.) 85.

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Lord Hewart C.J.

part of a name, but as part of a description, still if they are words of a certain kind they ought to be prohibited by the statute, which is another way of saying that in the opinion of the learned counsel this statute requires to be amended. That may be the true conclusion, but it is not the question raised upon this case. I think that the appeal succeeds.

SHEARMAN J. I am of the same opinion. The appellant was summoned under s. 8 of the Butter and Margarine Act, 1907. The offence charged was that in a wrapper enclosing margarine he described it by a name other than "margarine," or a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word "margarine." The appellant complied with the law by having an outer wrapper, and on the inner wrapper he put the words "Kernut Margarine" and then the words "churned with fresh milk." The magistrate convicted on the ground that the words "churned with fresh milk" were part of the fancy or descriptive name of the article sold. It seems to me that there was no evidence on which he could come to such a conclusion. The words are not a name. The words "Kernut Margarine churned with fresh milk" are not and cannot be a name at all, and cannot be a "descriptive name"; they may be descriptive, but they are not a name. On that ground it seems to me that the magistrate should not have arrived at the conclusion to convict the appellant. I see no reason to quarrel with the decision the judges arrived at in the Scottish case, but I do not think it helps us with regard to the present case. In my opinion the conviction was wrong.

ROCHE J. I agree.

Appeal allowed.

Solicitors for appellant: *Neve, Beck, Son & Co.*
Solicitors for respondent: *W. T. Ricketts & Son.*

R. F. S.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
1924
May 12.

THE KING *v.* MOSLEY.

Criminal Law—Indictment—Charges made upon which Prisoner not committed for Trial—Evidence in Deposition in Support of such Charges—Counts in Indictment in respect of such Charges—Prosecutor not bound over to prosecute—Leave of Judge not obtained—Vexatious Indictments Act, 1859 (22 *&* 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act,* 1867 (30 *&* 31 *Vict. c.* 35), *s.* 1.

Counts for offences within the Vexatious Indictments Act, 1859, may be added to the indictment without the leave of the Court where they are founded on facts disclosed on the depositions.

Reg. v. *Clarke* (1895) 59 J. P. 248 approved and followed.

APPEAL from a conviction.

The appellant was convicted before Mr. Commissioner Radcliffe, K.C., at the Leeds Assizes for obtaining goods by false pretences and also for obtaining credit by fraud and for obtaining credit without disclosing the fact that he was an undischarged bankrupt, and was sentenced to five years' penal servitude.

The appellant was charged before the stipendiary magistrate at Leeds with obtaining goods from various persons by false pretences with intent to defraud; there were also other charges against him under the Debtors Act, 1869, of obtaining credit by fraud, and also a charge under the Bankruptcy Act of obtaining credit without disclosing the fact that he was an undischarged bankrupt. The magistrate committed him for trial upon the charges under the Debtors Act, 1869, and the Bankruptcy Act only. The appellant in his grounds of appeal alleged that the magistrate refused to commit him upon the charges of obtaining goods by false pretences; but the clerk to the Leeds City justices, in a letter to the Registrar of the Court of Criminal Appeal, stated that the magistrate did not refuse to commit the appellant upon the charges of obtaining goods by false pretences, but in fact did not do so. The prosecutor was not bound over under the Vexatious Indictments Act, 1859, to prosecute the charges of obtaining goods by false pretences.

The indictment contained not only counts under the

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Debtors Act for obtaining credit by fraud, and under the Bankruptcy Act for obtaining credit without disclosing the fact that he was an undischarged bankrupt, but also six counts for obtaining goods from various persons by false pretences with intent to defraud, the evidence in support of those charges being on the depositions. It also included counts in respect of offences under the Debtors Act which were not before the magistrate. Leave was in fact asked for and obtained to add the new counts, which were founded on evidence not before the magistrate and of which notice had been given to the appellant, but leave was not asked for or obtained to add the counts for obtaining goods by false pretences, which charges had been before the magistrate, but upon which he had not committed the appellant.

The sentence of five years' penal servitude which was passed upon the appellant was given in respect of the counts in the indictment for obtaining goods by false pretences, and was the maximum sentence for that offence; the appellant was not sentenced in respect of the other counts.

R. F. Burnand for the appellant. The indictment upon which the appellant was convicted is bad under the Vexatious Indictments Act, 1859, because it contained counts in respect of the charges of obtaining goods by false pretences which were preferred before the magistrate, but upon which the appellant was not committed for trial, and in respect of which the prosecutor was not bound over under the Vexatious Indictments Act to prosecute. Sect. 1 of the Vexatious Indictments Act, 1859, provides that for certain offences, including obtaining money or other property by false pretences, no bill of indictment shall be presented to or found by any grand jury, unless the prosecutor has been bound by recognizance to prosecute, or unless the person accused has been committed for trial for such offences. That Act was found to be attended by much inconvenience, and accordingly its operation was restricted by the Criminal Law Amendment Act, 1867, which provides by s. 1 that the provisions of s. 1 of the Act of 1859 "shall not extend or be applicable to prevent the presentment

to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the Court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such Court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the Court in or before which the same may be preferred." The consent of the Court to add counts in respect of the charges for obtaining goods by false pretences, upon which charges the appellant was not committed for trial, was neither asked for nor obtained by the prosecution. Charges preferred before the justices on which they have refused to commit cannot be joined in an indictment with those on which the justices did commit, unless the prosecutor has been bound over as to the dismissed charges: see *Reg.* v. *Crabbe* (1); *Rex* v. *Coyne* (2); Archbold's Criminal Pleading, 26th ed. p. 71. It was held in *Rex* v. *Coyne* (2) at the Central Criminal Court that where a magistrate committed the accused person for trial for certain offences, and no further evidence was called in respect of other charges, and the magistrate was not asked to commit on those other charges, and expressed no opinion on them, but counts were subsequently added to the indictment in respect of such other charges, those facts amounted to a refusal to commit, and the counts thus added were quashed. In *Reg.* v. *Lord Mayor of London* (3) it was held that if the magistrate did not commit upon charges preferred before him, this amounted to a refusal to commit and the prosecutor's only remedy was

(1) (1895) 59 J. P. 247. (2) (1905) 69 J. P. 151.
(3) (1886) 16 Cox, C. C. 77.

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to be bound over to prosecute. If it is desired to prosecute the accused person for those offences within the Vexatious Indictments Act in respect of which he was not committed for trial a fresh bill of indictment must be preferred, for which the consent of the Court must be obtained. Under s. 1 of the Act of 1867 counts can be added without the leave of the Court, provided that in the opinion of the Court those counts are founded upon the facts or evidence disclosed in the deposition. But if it is not shown that in the opinion of the Court the evidence in support of such counts is disclosed on the deposition the counts are out of order. The consent of the Court is not a mere formality, but can only be granted upon proper materials, and if it is granted without proper materials the indictment or counts preferred in pursuance of such consent will be quashed: *Reg.* v. *Bradlaugh.* (1)

Mortimer K.C. and *Paley Scott* for the Crown. It was not necessary to obtain the leave of the Court in order to add the counts for obtaining goods by false pretences to the indictment, as they were all based upon facts or evidence appearing on the depositions. The Vexatious Indictments Act, 1859, was passed to prevent prisoners being put upon their trial without knowing the charges that were being made against them, but that difficulty does not arise in this case, as all the evidence relating to the counts for obtaining goods by false pretences appeared on the depositions. Under the Criminal Law Amendment Act, 1867, it is quite plain that if the facts upon which the added counts are based are disclosed on the deposition it is not necessary to apply to the judge for leave to add the counts before the indictment is presented to the grand jury. The practice was so stated by Mr. Horace Avory in *Reg.* v. *Clarke* (2) at the Central Criminal Court when arguing the case for the Crown, and that view was adopted by Henn Collins J. The decision in *Reg.* v. *Crabbe* (3) is not really against the present contention. There the application was to quash the whole indictment, as it contained certain counts which were not good.

(1) (1882) 15 Cox, C. C. 156. (2) (1895) 59 J. P. 248.
(3) (1895) 59 J. P. 247.

The judgment of the Court (LORD HEWART C.J., SHEARMAN and ROCHE JJ.) was delivered by

LORD HEWART C.J. The appellant was convicted upon an indictment which charged him in six counts with obtaining goods by false pretences with intent to defraud, in certain other counts with offences under the Debtors Act, 1869, and in one count with an offence under the Bankruptcy Act, and he was sentenced to five years' penal servitude upon the counts for false pretences, and no sentence at all was passed in respect of the other counts. The appellant now appeals against conviction and sentence.

The facts proved against the appellant were that he took a lock-up shop in Newcastle, and then by representing by the heading of his notepaper that he was carrying on a genuine business as a saddler, boot dealer and dealer in hosiery and drapery stores, obtained large quantities of goods. There was evidence that the shop was often closed during ordinary business hours, and that when the appellant was arrested the shop contained no goods at all. There was also evidence showing that goods had been supplied which were not paid for, and the appellant did not go into the witness box.

On the merits of the case there is nothing to be said, but it is said that a difficulty arises with regard to the indictment, because although the magistrate committed the appellant upon the charges under the Debtors Act, 1869, and the Bankruptcy Act, he omitted, if not refused, to commit him for trial upon the charges of obtaining goods by false pretences. An application was made to add counts not of false pretences but in respect of offences under the Debtors Act arising upon new materials, and as to that no observations are needed. It is said, however, that the indictment when it was framed and presented to the grand jury contained the six counts which I have mentioned for obtaining goods by false pretences, based indeed upon facts and evidence contained in the depositions and examination before the magistrate, but in respect of charges upon which there had been an

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omission, if not a refusal, on the part of the magistrate to commit the appellant for trial, and it is contended that in consequence of the provisions of the Vexatious Indictments Act, 1859, it was not possible to add those counts in the indictment, and that if it was desired to proceed upon them there should have been a specific application to the judge, and that they should have been made the subject of a separate indictment.

In the opinion of the Court that submission is one which cannot be supported. It depends upon a misconstruction of s. 1 of the Criminal Law Amendment Act, 1867. Under the Vexatious Indictments Act, 1859, it had indeed been provided that no bill of indictment for certain offences named, of which obtaining goods by false pretences was one, might be presented to, or found by, any grand jury unless certain conditions were fulfilled. Then came the Act of 1867 which, in order to remove the inconvenience caused by the earlier Act, enacted: that the provisions of s. 1 of the Act of 1859 "shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the Court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such Court in due course of law." In other words the later Act is based upon the view that when the conditions expressed are fulfilled the accused person is not taken by surprise.

It was said, nevertheless, notwithstanding the provisions of the Act of 1867, that what was done here was contrary to the law. But that argument also appears to be unsustainable. The matter is made plain by the case of *Rex* v. *Clarke* (1)

(1) 59 J. P. 248.

tried at the Central Criminal Court. The practice of the Court was then explained by Mr. Horace Avory (as he then was), who appeared with Mr. C. W. Mathews for the Crown, in these terms: "The practice of this Court has been established for years that, where the added counts are alleged to be founded on facts disclosed on the depositions, they may be added without the opinion of the Court being taken before presenting the bill to the grand jury." That practice was approved by the judgment of Henn Collins J. (as he then was), who said, amongst other things: "As to the objection taken under the Vexatious Indictments Act, I think that the obvious convenience is in favour of the view taken by the prosecution, and the words of the Act do not compel me to take any other view. The amending Act says that provided the subject matter of the new count may be lawfully joined with the rest of the indictment, and that the facts on which such count is founded (in the opinion of the Court in or before which the same bill of indictment be preferred) are disclosed on the depositions, the indictment can go before the grand jury properly. Whether the count is lawfully joined or not must be for the judge when it comes before him." When these counts came before the judge in the present case, the indictment having gone before the grand jury in that way, no objection was taken, nor did any objection appear to the mind of the learned judge. In those circumstances in the opinion of this Court this appeal against conviction fails.

With regard to the appeal against sentence the appellant has a bad record. That appeal, therefore, also fails and is dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

C. C. A.
1924
May 19.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* DONALD SMITH.

Criminal Law—Fraudulent Conversion—Deposit of Money by Employee with Employer as Security—Nature of Transaction—"Person . . . . entrusted . . . . with any property in order that he may retain in safe custody . . . . the property"—Loan—Question of Fact—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 20, *sub-s.* 1 (*iv.*) (*a*).

By s. 20, sub-s. 1, of the Larceny Act, 1916, "Every person who . . . . (*iv.*) (*a*) being entrusted . . . . with any property in order that he may retain in safe custody . . . . the property . . . . fraudulently converts to his own use . . . . the property" is guilty of a misdemeanour :—

Held, that whether the transaction is an "entrusting" within the meaning of the sub-section, or a loan, entitling the recipient of the property to use it, is a question of fact for the jury.

Rex v. *Hotine* (1904) 68 J. P. 143 considered.

Appeal by Donald Smith against a conviction at the Central Criminal Court, on a certificate granted by the learned Recorder under s. 3 (*b*) of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23). The facts are taken substantially from the judgment of Lord Hewart C.J.

In November, 1923, a man named Patrick Nolan, then unemployed, saw an advertisement in a newspaper : "Partner required for business agency to manage credit office. 50*l.* security. 2*l.* per week. Commission." In consequence he called on the appellant on November 28, who told him that he had recently opened a branch office of a "business transfer agency," and that he wanted a manager for that branch. He said he required 50*l.* security in case he (Nolan) should prove dishonest ; that he should deposit it at Barclays Bank, and that it would be returned at the end of three months. The next day Nolan paid the appellant 8*l.* on account of the 50*l.*, and on the following day he went to the branch office. On December 3 he signed an agreement and paid the appellant 42*l.*, the balance of the 50*l.* He went to the office regularly until January 26, 1924 ; during that time substantially no business was done. On January 23 Nolan called at the appellant's office and found him removing the furniture, and when asked what the meaning of that

was, the appellant said he was closing the office, as he had nothing left, and that he had lost his (Nolan's) 50*l.* in speculating.

In another case, one Vivian Budden also saw the appellant in answer to the advertisement, and was told a similar story, and handed him 50*l.* under similar circumstances and with the same result.

The appellant was charged with fraudulent conversion of the above moneys under s. 20, sub-s. 1 (iv.) (*a*), of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). (1) At the close of the case for the prosecution it was submitted on the authority of *Rex* v. *Hotine* (2) that there was no case to answer, because it was contended that as a matter of law this must be treated as a loan transaction only. The Recorder held that the nature of the transaction was one of fact for the jury, and so directed them.

The jury convicted the appellant.

Oddy for the appellant. The conviction was wrong. The facts in this case are practically identical with those in *Rex* v. *Hotine* (2), and in that case the Common Serjeant (Mr. Bosanquet), after consultation with Phillimore J., held as a matter of law that the recipient of the money was not a trustee, but was entitled to use the money as a loan. There was no evidence of a trust in the present case ; the appellant was not to return the same money to the depositors, and the property therein passed to the appellant at the moment it was handed to him. If any interest was payable thereon by the bank the appellant would be entitled to it. The Recorder treated the question as entirely a matter of fact for the jury ; but the question whether the appellant came within the purview of the sub-section was a question of law. This was a loan to be repaid at a future time, as it was

(1) Larceny Act, 1916, s. 20, sub-s. 1 : "Every person who . . . . (iv) (*a*) being entrusted . . . . with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property . . . . fraudulently converts to his own use or benefit . . . . the property . . . . shall be guilty of a misdemeanour."

(2) 68 J. P. 143.

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held to be in *Rex* v. *Hotine* (1), decided on s. 1, sub-s. 1 (*a*), of the Larceny Act, 1901 (1 Edw. 7, c. 10), which is substantially re-enacted in the present sub-section.

[*Rex* v. *Noel* (2); *Rex* v. *Lord* (3); and *Rex* v. *O'Brien* (4) were also referred to.]

Sir Patrick Hastings A.-G., *Giveen* and *G. D. Roberts* for the Crown were not called upon to argue.

The judgment of the Court (LORD HEWART C.J., ROCHE and BRANSON JJ.) was delivered by

LORD HEWART C.J. The appellant was convicted on four counts of an indictment which charged him under s. 20, sub-s. 1 (iv.) (*a*), of the Larceny Act, 1916, with fraudulent conversion, and he appeals against his conviction on a certificate granted by the learned Recorder. The sub-section under which the indictment is framed provides: [His Lordship read it. (5)].

The facts were as follows: [His Lordship stated them.] At the close of the case for the prosecution it was submitted that on the authority of *Rex* v. *Hotine* (1) there was no case to go to the jury, and that as a matter of law the Recorder ought to have held that the appellant must be acquitted. It is not necessary to make more than two observations on *Rex* v. *Hotine*. (1) The first is that the facts do not appear to be fully reported; the second is, that if the Common Serjeant intended to lay down in general terms that where money is paid by way of deposit as security for the honesty of the person so paying it, the person to whom it is paid is entitled to use it as his own, then the judgment cannot be supported. In *Rex* v. *Noel* (2) Ridley J., referring to *Rex* v. *Hotine* (1), said (6): "That was a case where money was delivered to an employer as a guarantee of the honesty of persons employed by him, and the question was whether the money so entrusted was within the Larceny Act, 1901. According to the view of the Common Serjeant and of

(1) 68 J. P. 143.
(2) (1914) 10 Cr. App. R. 255. Also reported, but not on this point [1914] 3 K. B. 848.
(3) (1905) 69 J. P. 467.
(4) (1911) 75 J. P. 392.
(5) Note (1) ante, p. 195.
(6) 10 Cr. App. R. 255, 260.

Phillimore J., the money could not be so treated; they regarded it as money which the employer was entitled to use. If so, it became a loan. *Rex* v. *Hotine* (1) was treated in this way by Lord Alverstone C.J. in *Rex* v. *Lord*. (2) If *Rex* v. *Hotine* (1) is to be treated otherwise, it cannot be supported." In other words, it may appear from the facts of a particular case that the money was really lent, but it is a question of fact whether that is or is not the true nature of the transaction. The Recorder in the present case rightly left it to the jury to say what the true nature of the transaction was, and they came to the conclusion that the money was not lent, but was entrusted to the appellant to be kept until the happening of a particular event, and upon the non-occurrence of that event, subject to certain other defined conditions, was to be handed back. In the opinion of the Court there was ample evidence to support that finding. With regard to *Rex* v. *Hotine* (1), the Common Serjeant was a lawyer of eminence for whose opinion, properly reported, there must be great respect, and it is impossible to suppose that he laid down any such general proposition as the one we have been invited to accept. The appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 68 J. P. 143. (2) (1905) 69 J. P. 467.

W. L. L. B.

1924
March 26.

ALBERT EADIE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super Tax—Profits of Wife—Husband and Wife living apart—Deed of Arrangement—Periodical Payment by Husband to Wife—Wife "living with her husband"—Husband's Liability to Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *First Schedule, Sch. D, All Schedules Rules, r.* 16 (1.).

The appellant and his wife, between whom differences had arisen, executed an indenture in 1912, which provided that the appellant would, during their joint lives, and so long as they continued to reside at a certain house, and so long as she observed the covenants therein, pay to her the weekly sum of 30*l.*, amounting to 1560*l.* a year, for her sole and separate use; that the appellant should be at liberty to reside at and have the joint use of the house free of expense; that his wife would, so long as he should pay the weekly sum, pay the rates, taxes and assessments, repairs, and household expenses, wages, and tradesmen's bills in respect of the premises, and would indemnify him against these payments and her maintenance, and would not pledge his credit; that she would not take any steps to compel him to cohabit with her or interfere with him in any manner; and that the indenture might be determined by either party by six months' notice. The appellant did not since the date of the indenture live maritally with his wife, and in February, 1913, he ceased to reside at the said house, and since that time they had lived continuously apart and had no direct communication. In 1921 the appellant gave notice terminating the indenture. From 1912 to 1921 the appellant duly paid the said weekly sum to his wife. In the assessment of the appellant to super tax for two of the years during which the deed was in operation the respective annual sums of 1560*l.* each were sought to be included as part of his income:—

Held, that, in the circumstances, the appellant's wife was not during the said years "a married woman living with her husband" within the Income Tax Act, 1918, First Schedule, General Rules, r. 16, proviso (1.), so that her income could not be assessed in his name instead of her own; that the said sums formed part of the income of the appellant's wife and not of the appellant; and, therefore, that these sums should not be included as part of the appellant's income for purposes of super tax.

Rex v. *Creamer* [1919] 1 K. B. 564 distinguished.

Case stated by Commissioners for the special purposes of the Income Tax Acts.

By an indenture dated December 9, 1912, and made between Albert Eadie, Esq., then of Rigby Hall, Bromsgrove, in the county of Worcester (hereinafter called "the appellant," except in the indentures herein set forth, wherein he is described as

the "husband"), of the one part and Emmie Elizabeth Eadie, the wife of the appellant (hereinafter called the "wife"), of the other part, after reciting that differences had arisen between the appellant and his wife, it was agreed as follows: "(1.) The husband will during the joint lives of himself and his wife as from the date hereof and so long as they continue to reside at Rigby Hall and so long as the wife performs and observes the covenants on her part hereinafter contained pay to the wife the weekly sum of 30*l.* for her sole and separate use and so far as the same shall extend for the purposes hereinafter expressed and so that she shall not have power to dispose thereof in the way of anticipation, but so nevertheless that the said weekly sum of 30*l.* shall cease to be payable if the marriage between the said husband and wife shall at any time hereafter be dissolved or they shall be judicially separated by a Court of competent jurisdiction. (2.) The husband will so far as he considers necessary for himself and his friends keep up the wine cellar at his expense. The husband shall have the sole use of his chauffeur and valet as his own private servants and shall pay their wages. The husband shall also be at liberty to reside at and have the joint use of Rigby Hall, the garage and appointments and amenities of the estate free of expense. He will occupy the separate bedroom at present occupied by him. He shall also be at liberty at any time to have any of his relations and friends and their servants to stay at Rigby Hall free of expense. And this Indenture also witnesseth that in further pursuance of the said agreement and in consideration of the premises the wife hereby covenants with the husband as follows: (3.) The wife will at all times hereafter so long as the husband shall pay the said weekly sum pay all rates taxes charges and assessments payable in respect of Rigby Hall including the fire insurance of the buildings and the furniture and effects and will pay the cost of keeping the premises in the same state of repair and condition as the same are now in and properly painted and decorated and will keep and maintain the contents of the said house substantially as at present and will not remove or interfere with any of the husband's property and effects and will

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also keep a proper staff of indoor servants suitable to the requirements of the premises and will also maintain and pay their wages and maintain and pay the wages of her chauffeur. The husband will give the wife the B.S.A. motor car, but the same shall be maintained and run and petrol oil and tyres and all accessories and repairs for the same supplied by and at the sole expense of the wife. (4.) The wife will pay the gardeners' wages (the same number of gardeners being kept as at present) and keep up the 'outside' thereof, viz.: the electric light plant and the production of the electric current the grounds gardens and greenhouses in as good condition in all respects as the same are now in and the produce of such gardens and greenhouses shall so far as possible be used in the house and the wife shall also receive the rents and profits of the land held with Rigby and now let off. (5.) The husband will pay to the wife for the wages of the said gardeners as paid and the expense of the upkeep of the said gardens and electric light actually incurred an annual sum not exceeding 375*l.* per annum upon accounts to be submitted to the husband. . . . . (6.) The wife shall indemnify and keep indemnified the husband from and against all debts and liabilities now or hereafter to be contracted or incurred by the wife whether in respect of the aforesaid payments to be made by her in respect of Rigby Hall and the appurtenances or in respect of her wearing apparel maintenance support personal expenditure or otherwise and from and against all claims and demands for or on account of the same and will not pledge the husband's credit in respect of any of the matters aforesaid or on any other account whatever, and if the wife shall make default in observing the aforesaid covenant all moneys paid by the husband in respect of any such debt or liability may be retained by him out of the said sums payable to the wife as aforesaid notwithstanding the restraint on anticipation. (7.) The wife or any person on her behalf shall not nor will at any time hereafter take any steps to compel the husband to cohabit with her or to allow her any support maintenance or alimony except the said weekly sum of 30*l.* and shall not nor will molest or interfere with the husband or his visitors and guests or valet in any manner.

(8.) The wife will pay all house books household expenses and wages and tradesmen's bills at the end of every month and doth hereby covenant that the said weekly sum of 30*l.* shall be used for the upkeep of Rigby Hall and with her own money for her maintenance personal expenses wearing apparel and support and for no other purpose whatever. (9.) This agreement may be determined by either party by six months notice in writing."

Rigby Hall was at the date of this agreement the property of the appellant's wife, for whom it had been purchased by the appellant.

The indenture of December 9, 1912, was made in view of previous disagreements which had led to the appellant and his wife ceasing to live maritally with one another, although both resided in the same house. The appellant did not then or subsequently live maritally with his wife, and in February, 1913, after the marriage of his daughter the appellant ceased to reside at or to visit Rigby Hall, and since that date the appellant and his wife had lived continuously apart and had had no direct communication. Since February, 1913, the appellant had resided in London.

In June, 1921, the appellant gave notice in writing to his wife terminating the indenture of December 9, 1912, in accordance with cl. 9 thereof. The said notice expired on December 9, 1921.

From December 9, 1912, until December 9, 1921, the weekly sum of 30*l.* (amounting to 1560*l.* per annum) was paid by the appellant to his said wife in accordance with cl. 1 of the aforesaid indenture.

By an indenture made on February 17, 1922, between the appellant (therein called the "husband") of the one part, and his said wife of the other part, after reciting the facts above set out and that the husband and wife had agreed to continue to live separate from each other, it was agreed (inter alia) as follows: "(1.) Subject to clause 3 hereof the wife may at all times hereafter during the life of the husband live separate from him and free from his control and authority as if she were unmarried and reside at such place as she may

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from time to time think fit without any interference whatever on the part of the husband. (2.) The husband shall continue to live separate from the wife and will not . . . . molest or annoy or interfere with the wife or any person or persons with whom she may be residing or who may be residing with her in any manner whatsoever or howsoever. (3.) So long as the husband shall pay to the wife the weekly sum hereinafter mentioned by the instalments and in the manner hereinafter mentioned, the wife will continue to live separate from the husband and will not . . . . molest or annoy or interfere with the husband or any person or persons with whom he may be residing or who may be residing with him in any manner whatsoever or howsoever. . . . ."

In arriving at the original assessments to super tax made upon the appellant for the years ending April 5, 1919, and April 5, 1921, no sums were included in respect of the income of the appellant's wife, and a sum of 1560*l.*, representing the amount paid by the appellant to his wife under the indenture of 1912, had been allowed as a deduction in each of the said years.

An additional assessment to super tax in the sum of 3500*l.* for each of these two years was made upon the appellant in order to cover his liability in respect of the income of his wife and the said sum of 1560*l.*

The appellant appealed against these assessments to the Special Commissioners.

The Special Commissioners in giving their decision stated that in their opinion the relations existing between the appellant and his wife during the material years were governed by the deed of December 9, 1912 ; that that deed remained in force until terminated by the appellant by notice thereunder expiring on December 9, 1921 ; that the appellant and his wife had not in fact lived together since 1913, but had he so desired the appellant could at any time have taken up his residence at Rigby Hall, where his wife resided; that separation took place under the deed of February 17, 1922 ; that down to that date the appellant's wife was in the opinion of the Commissioners " a married woman living with her husband "

within the meaning of the Income Tax Act, 1918, First Schedule, All Schedules Rules, r. 16, proviso (1.) (1), even though the parties had not in fact lived together since February, 1913 : see *Rex* v. *Creamer* (2) ; that the income of the appellant's wife must be deemed to be the income of the appellant ; and that the appellant was not entitled to deduct from his statements of total income the 1560*l.* paid by him yearly under cl. 1 of the deed of December 9, 1912 ; but that the additional assessments for the said two years should be reduced to 2385*l.* and 2031*l.* respectively.

The sole questions upon which the opinion of the High Court was requested were : (1.) whether upon the facts hereinbefore set out the appellant's wife was during the years ending April 5, 1919, and April 5, 1921, a married woman living with her husband, and (2.) whether the said yearly sum of 1560*l.* formed part of the income of the wife of the appellant.

Roland Burrows for the appellant. The appellant's wife was not at any material time " a married woman living with her husband " within the meaning of the Income Tax Act, 1918, First Schedule, General Rules, r. 16, proviso (1.), and her profits are not therefore assessable in his name but in her own. By entering into the indenture of 1912 the parties became separated at its date, and they lived separate under it

(1) Income Tax Act, 1918, First Schedule, General Rules : " 16. A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried :

" Provided that—

" (1.) The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee ; and

" (2.) A married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a feme sole if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit."

(2) [1919] 1 K. B. 564.

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ever since. The indenture by cl. 7 entirely released the parties from the right and duty of cohabitation, and by virtue of that clause it was in effect a deed of separation. At all events the parties have been living separate since February, 1913, when the appellant ceased to reside in the same house with his wife and acquired a residence of his own, and the indenture of 1922 recites that fact. The fact that a husband and wife do not reside in the same house does not necessarily imply that there is no consortium between them; and on the other hand the fact that they may and do for a time reside in the same house does not necessarily constitute a consortium: *Powell* v. *Powell* (1); *Pulford* v. *Pulford* (2); and *Jackson* v. *Jackson*. (3) The case of *Rex* v. *Creamer* (4) is distinguishable from the present, because there the parties were temporarily living apart not because of any estrangement between them but merely because the husband was on duty abroad.

The sums in question formed part of the income of the appellant's wife and not of the appellant, and she was assessable to tax in respect of them. The agreement between the parties was not voluntary but onerous. The obligation of the appellant to pay the weekly sums to his wife was not conditional upon the parties continuing to reside at Rigby Hall. Clause 3, which provided that the wife should perform certain obligations so long as the appellant should pay the weekly sum, was entirely independent of the condition that the parties should reside together at that house. Clause 4, which was an undertaking by the wife to do certain other things so long as the appellant should pay that sum, was also independent of the parties residing together. Clause 7, by which the wife undertook that she would not take steps to compel cohabitation or payment of alimony except the said weekly sum, or interfere with the appellant, was likewise absolute and unlimited to residence in the same house. In order to retain to himself the benefit of these clauses the appellant was bound to continue paying his wife the weekly sums. The payment of these sums by the appellant was not voluntary but

(1) [1922] P. 278.
(2) [1923] P. 18, 20.
(3) [1924] P. 19.
(4) [1919] 1 K. B. 564.

compulsory. He could not have resisted an action to recover them.

That being so, the sums in question did not form any part of the income of the appellant, and he was not assessable to super tax in respect of them.

Sir H. H. Slesser S.-G. and *R. P. Hills* for the respondents. The appellant's wife was "a married woman living with her husband" within the meaning of r. 16, proviso (1.), and her profits were therefore the profits of the appellant and assessable in his name. The relationship of husband and wife has all along existed between the parties, and the full legal rights belonging to them by reason of that relationship have never been affected by any decree of the Court or any other act in law. The indenture of 1912 is based on the assumption that the parties will both reside at Rigby Hall. Under its provisions the parties could reside there if they pleased. The appellant was entitled to go there at any time down to the end of the period during which the deed was in operation. So long as the parties had a right to reside there, then, whether the appellant in fact availed himself of that right or not, he could not be heard to say that he did not reside there, or that he and his wife did not reside there together. The fact that a husband lived temporarily apart from his wife for reasons of business, or perhaps even of pleasure, would not prevent them from living together in the eye of the law: see r. 16, proviso (2.). Neither should the fact of their living apart by reason of estrangement have that effect. It cannot, however, be expected that in a case of this nature the Crown should inquire minutely into the motives that may induce a husband and wife to live apart. In this case the consortium of the husband and wife was not destroyed, and they were still living together: *Rex* v. *Creamer*. (1) The indenture of 1912 was not a deed of separation, but a deed of family arrangement: *Jodrell* v. *Jodrell*. (2)

Under the indenture of 1912 the obligation of the appellant to pay the weekly sums was to continue so long as the appellant and his wife lived together at Rigby Hall. If

(1) [1919] 1 K. B. 564. (2) (1845) 9 Beav. 45.

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the appellant and his wife were not living together there during the relevant period, then the indenture was inoperative and the appellant paid these sums to his wife not compulsorily but voluntarily and by way of gift. In that case they were not payments by which his income was diminished, and were not deductible in ascertaining his total income for the purposes of super tax.

ROWLATT J. I think that this appeal should be allowed.

The first question is whether the appellant's wife was " a married woman living with her husband " within the meaning of the Income Tax Act, 1918, First Schedule, General Rules, r. 16, proviso (1.), under which the profits of a married woman to whom these words apply shall be deemed the profits of her husband and assessed and charged in his name and not in her own, although according to the main scheme of the rule, as stated at its commencement, a married woman entitled to property or profits to her separate use shall be assessable and chargeable as if she were unmarried. In order to be properly understood the proviso in question must be construed with reference to the matter with which it was meant to deal. It is meant to define the circumstances in which a husband can be charged to income tax in respect of the income of his wife as being income accruing to her while she is living with him. One must not lose sight of that aspect of the provision.

In the present case the appellant and his wife entered into a very peculiar deed dated December 9, 1912, by which they were to occupy, or at any rate to have the right of occupying together, a house called Rigby Hall, not that they might live there together as husband and wife, but merely as having there a joint establishment arranged for them by the deed in a very minute manner. The appellant was to pay to his wife a weekly sum of 30*l.*, and she had other property of her own also. She was to pay all household expenses, wages and tradesmen's bills, and to make other payments relating to the establishment. In my view under the deed the appellant and his wife were not living separate from each other, but if they were living together while they were residing together under

the deed they were doing so in a very abnormal and artificial way. In February, 1913, the appellant ceased to reside at or to visit Rigby Hall and took a residence for himself in London, where he has ever since resided, but he went on paying his wife the 30*l.* under the deed. That state of matters continued down to the period to which this inquiry relates. In these circumstances I should have thought that it was perfectly clear that the appellant's wife was not a married woman living with her husband. She had her residence and he had his residence. His home was not her home, and her home was not his home. They had two separate addresses: two separate residences: two separate homes; and therefore I think they were not living together.

The Commissioners, I think, have been led astray by the case of *Rex* v. *Creamer*. (1) In that case it was held incidentally that a married woman had not ceased to live with her husband and become separated from him merely by reason of the fact that he had gone to France during the war and left her living at home. In that state of matters of course they had not necessarily ceased to live together and become separated. A man may leave his wife in order to go on public duty, or for business purposes. Before the means of communication were so common and so efficient as they now are husbands employed in distant countries had sometimes to leave their wives for long periods. A husband may leave his wife for a time even for pleasure, if he wants to do something which she does not want to do; or she may leave him for the same reason. In none of these cases, however, are they separated from each other. They have still their common home, or common homes if they are rich people and have more than one house. They still act from the same base, if I may use that expression, and the physical separation, therefore, is immaterial. The case is very different, however, in which the parties leave each other because they cannot tolerate being under the same roof, even in such circumstances as are provided by this deed, and have two separate addresses, the one in Worcestershire and the other in London, and remain living in that way for five years. In

(1) [1919] 1 K. B. 564.

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these circumstances I think it is playing with words to say that the wife is still living with her husband. I do not think it necessary to say so in order to give effect to the principles of any branch of the law. It therefore seems to me that that question must be answered in favour of the appellant.

The next question is whether the appellant can deduct from his income the 30*l.* a week which he paid to his wife. If he is under an obligation to pay the money, if, although separated from his wife, he is separated on the terms of paying the money, then he can deduct the amount paid. If, on the other hand, he is under no obligation to pay the money, but voluntarily sends it to his wife week by week because he thinks it is the right thing to do, or for some other reason of his own, he cannot deduct it, inasmuch as he is merely spending his money in the way in which he chooses to spend it. In the former case the payment is not, in the latter case it is, an expense which goes against his income. I have to decide whether the appellant made the payments in question voluntarily or because he was obliged to make them. In order to answer that question I must look at the legal position of the parties. The deed is, in one respect, somewhat curiously drawn. It begins by saying: "The husband will during the joint lives of himself and his wife as from the date hereof and so long as they continue to reside at Rigby Hall . . . . pay to the wife the weekly sum of 30*l.*" Then with regard to the appellant living there it says: "The husband shall also be at liberty to reside at and have the joint use of Rigby Hall." Do these provisions mean that, if the appellant went away from Rigby Hall, as he in fact did, the agreement was thereby determined, or that the appellant's obligation to pay vanished, because the parties no longer resided together at Rigby Hall? I do not think so. I do not think that in the first of these provisions the phrase "so long as they continue to reside at Rigby Hall" imposes a limit to the operation of the agreement. If that phrase had been intended to impose an absolute limit of time, it would not have been preceded by the statement that the husband would "during the joint lives of himself and his wife" pay the weekly sum, because in that case when

they ceased to reside at Rigby Hall their obligations under the agreement would have been over and the mention of their "joint lives" would have been unnecessary. I do not think that one of the parties by going away could put an end to his or her obligations under the agreement. It is to be observed that the appellant is not required to reside at Rigby Hall, but is only to be at liberty to reside at and have the joint use of that house. It is further to be observed that the agreement contains a clause expressly providing for its determination by six months' notice in writing. When the appellant ceased to reside at Rigby Hall he continued to pay the weekly sum of 30*l.* until the agreement was determined. If he had not paid it I do not think he could have defended an action to recover it. I do not think he could have argued with any hope of success that he was under no obligation to pay because by merely leaving Rigby Hall he had brought about a state of facts which put an end to the existence of this agreement, expressly providing as it does for its determination by six months' notice. The appellant properly went on paying the money because he was under an obligation to do so and was legally compellable to do so. That being so, the sums in question did not form part of the appellant's income, and he was entitled to deduct them for the purposes of super tax.

In my opinion the appellant is entitled to succeed in this appeal.

Appeal allowed.

Solicitors for appellant: *Francis & Crookenden.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

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THE KING *v.* MINISTER OF LABOUR AND ANOTHER.

Electricity—Transfer of Undertaking—Compensation for Deprivation of Employment—Jurisdiction of Referee appointed by Minister of Labour—Electric Lighting Orders Confirmation (No. 17) Act, 1899 (62 & 63 *Vict. c. cxli.*)—*Electricity (Supply) Act*, 1919 (9 & 10 *Geo. 5, c.* 100), *s.* 16—*Torquay Corporation (Electricity) Act*, 1922 (12 & 13 *Geo. 5, c. lvi.*)—*Electricity (Supply) Act*, 1922 (12 & 13 *Geo. 5, c.* 46), *s.* 21.

Under s. 16 of the Electricity (Supply) Act, 1919, as amended by s. 21 of the Electricity (Supply) Act, 1922, which relates to claims for compensation for deprivation of employment by officers or servants of an undertaking which has been transferred under or in consequence of the Act of 1919, the referee appointed by the Minister of Labour under the section is in the position of an arbitrator and has power to determine whether the transfer of the undertaking giving rise to the claim has been effected "under" the Act of 1919, as well as the quantum of compensation payable. If the claimant fails to satisfy the referee that the transfer was "under" the Act of 1919, the question whether it was "in consequence of" that Act is, by the proviso to s. 21 of the Electricity (Supply) Act, 1922, to be determined by the Electricity Commissioners.

RULE NISI for certiorari directed to the Minister of Labour to bring up, for the purpose of being quashed, a letter dated December 11, 1923, appointing Sir William Mackenzie K.C. as referee in a claim for compensation by George Edward Smith (hereinafter called "the claimant") against Torquay Corporation; and rule nisi for prohibition directed to the Minister of Labour and Sir William Mackenzie prohibiting them from proceeding with the hearing of the claim.

The claim arose out of the acquisition by the Torquay Corporation of a private undertaking which supplied electrical energy in the area of the Newton Abbot local authority under the Newton Abbot Electric Lighting Order, 1899, confirmed by the Electric Lighting Orders Confirmation (No. 17) Act, 1899. Sect. 58 of that Order empowered the Newton Abbot local authority to acquire the said undertaking within a certain period, which was afterwards extended. In 1922 an agreement was made between the Newton Abbot local authority and Torquay Corporation whereby the former were to exercise their option to purchase the undertaking and the Torquay Corporation were to promote a Bill

authorizing the transfer to them of the undertaking. A Bill was accordingly promoted, and became the Torquay Corporation (Electricity) Act, 1922, receiving the Royal Assent on July 20, 1922, and thereafter—namely, on April 30, 1923—the undertaking was transferred to the Torquay Corporation.

Before and at the date of the transfer the claimant was employed by the undertakers, but on July 31, 1923, shortly after the transfer was effected, his employment in the Newton Abbot area ceased, and, accordingly, he claimed under s. 16 of the Electricity (Supply) Act, 1919, and s. 21 of the Electricity (Supply) Act, 1922 (1), compensation for loss of employment or diminution of salary. Torquay Corporation contended that the transfer of the undertaking was under the Order of 1899 and the Torquay Corporation (Electricity) Act, 1922, and was not under or in consequence of the Electricity (Supply) Act, 1919, or the Electricity (Supply) Act, 1922, the latter Act having received the Royal Assent on August 4, 1922, some days after the date of the Torquay Corporation (Electricity) Act, 1922, and, therefore, that the Minister of Labour had no jurisdiction to appoint a referee under s. 16 of the Act of 1919, and that Sir William Mackenzie had no jurisdiction to proceed with the reference.

The Electricity Commissioners on being asked to decide

(1) Electricity (Supply) Act, 1919, s. 16: "If after May 8, 1919, and within five years from the date when under this Act a transfer of the whole or any part of an undertaking has been effected, or a scheme .... has come into operation, or an agreement [between authorised undertakers] has been entered into, any officer or servant who has, before the said May 8, been regularly employed in or about the undertaking .... proves to the satisfaction of a referee or a board of referees appointed by the Minister of Labour that in consequence of this Act he (1.) has suffered loss of employment, or diminution of salary, wages or emoluments," he shall be entitled to "such compensation as the referee or board of referees may award."

Electricity (Supply) Act, 1922, s. 21, sub-s. 1: "Section 16 of the principal Act [the Act of 1919] shall have effect as if for the words 'under this Act' there were substituted the words 'under or in consequence of this Act' and as if for the words 'in consequence of this Act' there were substituted the words 'in consequence of any such transfer scheme, agreement or arrangement.'

"Provided that any question as to whether a transfer scheme, agreement or arrangement, not made under the principal Act, was in consequence of that Act, shall be determined by the Electricity Commissioners."

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whether the transfer was "in consequence of" the Act of 1919 expressed the opinion that their jurisdiction did not arise until it had been decided that the transfer was not "under" that Act.

Sir H. Slesser S.-G. and *C. W. Lilley* (*Sir Patrick Hastings A.-G.* with them) for the Minister of Labour showed cause. Certiorari will not lie in this case to the Minister who in appointing a referee has merely performed a ministerial, and not a judicial, act. As was said in *Palgrave Gold Mining Co.* v. *McMillan* (1): "It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointments should be made with integrity and impartiality; but it is new to their Lordships to hear them called judicial acts." Nor will prohibition lie to the Minister in these circumstances for he, having appointed the referee, is functus officio. It is not for him to say whether the transfer in question was "under" or "in consequence of" the Electricity (Supply) Act, 1919, but for the referee or for the Electricity Commissioners.

[*In re Grosvenor and West End Railway Terminus Hotel Co.* (2) was cited.]

Craig Henderson K.C. and *Engelbach* for the claimant. The transfer to the Torquay Corporation was "under" the Act of 1919.

[LORD HEWART C.J. What is the nexus between the Newton Abbot Electric Lighting Order and the Electricity (Supply) Act, 1919?]

Under the Electric Lighting Act, 1882, there arose a number of small undertakings. Local authorities had power to apply for provisional orders or to purchase existing undertakings. Nowadays electrical generation from central sources is found to be more economical, and the Act of 1919 aims at developing this still more by creating Electricity Commissioners and investing them with wide powers, including power to form joint electricity authorities, grouping a number of

(1) [1892] A. C. 460, 470. (2) (1897) 76 L. T. 337.

districts therein. The idea is that eventually all these authorities shall come under the control of the central authority. It is therefore most important that the Electricity Commissioners should be in a position to exercise control over transfers and acquisitions of electric undertakings. As, however, before joint electricity authorities could be set up the plans of the Commissioners might be interfered with, it is provided—s. 13, sub-s. 3, of the Act of 1919—that the right of purchase by a local authority shall not be exercised without the consent of the Commissioners in any district where a joint electricity authority has not been appointed. If therefore the transfer cannot be carried out without the consent of the Commissioners it is " under " the Act, and the provisions of s. 16, as amended by s. 21 of the Act of 1922, apply. If it is disputed that the transfer is " under " the Act of 1919 it is for the referee or board of referees appointed by the Minister of Labour to decide the question. A tribunal appointed for purposes such as the present has power to find the facts on which its jurisdiction depends: see Halsbury's Laws of England, vol. xxiii., p. 330, and per Lord Esher M.R. in *Reg.* v. *Special Commissioners of Income Tax.* (1) By s. 16, as amended by s. 21 of the Act of 1922, the claimant has to prove that the transfer, out of which has arisen his loss of employment or diminution of salary, is " under " or " in consequence of " the Act, but it is specially provided that it is for the Electricity Commissioners to determine whether it is " in consequence of " the Act. It is clearly the intention of the section that the referee shall decide, after hearing evidence, whether the transfer is " under " the Act or not. In this case the claimant's rights became crystallized, not at the date of the Torquay Corporation Act, 1922, but when his employment ceased—namely, on July 31, 1923.

Compston K.C., *Jeeves K.C.* and *Maurice FitzGerald* for Torquay Corporation. The Minister of Labour had no jurisdiction to appoint a referee, and the referee had no jurisdiction to enter upon the reference, inasmuch as the

(1) (1888) 21 Q. B. D. 313, 319.

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transfer of the undertaking to Torquay Corporation was neither " under " nor " in consequence of " the Act of 1919, but was under the Torquay Corporation (Electricity) Act, 1922. In any event the Minister of Labour, before appointing a referee must be satisfied that the transfer is " under " the Act of 1919. It is for him to determine that question. The referee's powers are strictly limited to fixing the amount of compensation in consequence of the transfer of an undertaking; he has no jurisdiction to decide whether or not the transfer has taken place " under " the Act of 1919, the other question whether the transfer has been " in consequence of " the Act being reserved for the determination of the Electricity Commissioners. Nowhere in the Act of 1919 is the reference to the appointed referee regarded as an arbitration; the referee is not called an " arbitrator," and the Arbitration Act, 1889, is not mentioned, so that the machinery for questioning an arbitrator's decision is not available in the case of this referee.

[*Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (1) and *Rex* v. *Electricity Commissioners* (2) were referred to.]

LORD HEWART C.J. These are rules nisi for certiorari and prohibition to quash the appointment of the referee and to prohibit the Minister of Labour and the referee from proceeding further in this matter. The grounds upon which the rules were obtained are that the Minister of Labour had no jurisdiction in the circumstances to appoint a referee and that the referee has no jurisdiction to proceed to act under his appointment. If I may adopt the words of Sir George Jessel M.R. in *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (3), I may say that " this case affords a strong illustration of the difficulty of dealing with questions of construction of Acts of Parliament."

The question arises under s. 16 of the Electricity (Supply) Act, 1919, as modified by s. 21 of the Electricity (Supply) Act, 1922. Upon the construction of these sections we have

(1) (1881) 17 Ch. D. 493. (2) [1924] 1 K. B. 171.
(3) 17 Ch. D. 493, 497.

to see whether there was an excess or lack of jurisdiction such as is complained of. The scheme of s. 16 of the Act of 1919 is a little unusual. The section begins with the word "If," and one might have expected that it was about to prescribe that certain things are to happen if a transfer of an undertaking has been effected under the Act; but that is not the scheme of the section. The section says that if any officer or servant proves to the satisfaction of a referee or a board of referees that certain things have happened he is to be entitled to compensation, and, wrapped up in the statement of that which he has to prove to the satisfaction of the referee or board of referees in order to entitle him to the compensation which he claims, is a reference to a particular kind of transfer. To leave out the less important words the scheme of the section is this: if after a certain date any officer or servant who has before that date been regularly employed in or about the undertaking proves to the satisfaction of a referee or a board of referees appointed by the Minister of Labour that in certain circumstances he has suffered loss of employment or diminution of salary, certain consequences are to follow. The section is thus dealing with that which has to be proved to the satisfaction of the referee or board of referees in order that the claimant may succeed. In that part of the section which is dealing with the question of date the words originally were: "If after May 8, 1919, and within five years from the date when under this Act a transfer of the whole or any part of an undertaking has been effected, or a scheme for the improvement of the supply of electricity . . . . has come into operation, or an agreement or arrangement between various authorized undertakers for the rendering of mutual assistance . . . . has been entered into," the claimant, in order that he may succeed, must prove that the loss he has suffered was a loss "in consequence of this Act." This language has been modified by s. 21 of the Act of 1922, but in my opinion this modification, instead of altering the scheme of s. 16, has made a little more plain what I conceive to have been always its intention, so far as the duties of the referee are concerned. By s. 21

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of the Act of 1922 it is provided that s. 16 of the Act of 1919 is to have effect as if for the words "under this Act" in s. 16 of the Act of 1919 there were substituted the words "under or in consequence of this Act," and as if for the words "in consequence of this Act" there were substituted the words "in consequence of any such transfer scheme, agreement or arrangement," so that s. 16, as so varied, now reads thus: "If after May 8, 1919, and within five years from the date when under or in consequence of this Act a transfer of the whole or any part of an undertaking has been effected, or a scheme . . . . has come into operation or an agreement . . . . has been entered into, any officer or servant who has, before the said May 8, been regularly employed in or about the undertaking . . . . proves to the satisfaction of a referee or a board of referees appointed by the Minister of Labour that in consequence of any such transfer scheme, agreement or arrangement he has suffered loss of employment," then certain consequences shall follow. The claimant, therefore, if he is to be successful, must prove to the satisfaction of the referee or board of referees that the loss which he alleges was a loss suffered in consequence of a transfer scheme, agreement or arrangement "under or in consequence of this Act." Looking further at s. 21 of the Act of 1922, one observes that one of these alternatives is dealt with in a special manner, for the section says: "Provided that any question as to whether a transfer scheme, agreement or arrangement, not made under the principal Act, was in consequence of that Act, shall be determined by the Electricity Commissioners." Reading the two sections together I think that the meaning is that a claimant for compensation must begin with the task of satisfying the referee, if he can, that the loss which he has suffered is a loss due to a transfer scheme, agreement or arrangement coming within the section. To discharge that onus he may seek to show that the transfer scheme, agreement or arrangement was "under this Act." If it was "under this Act" the referee will deal with it. But it may be alleged that when the facts are accurately considered the transfer scheme was not "under

this Act," and if it is to be brought into relation with the Act it can only be by proving that it was " in consequence of " the Act, and if that question does arise it is to be determined by the Electricity Commissioners, and not by the referee. It is useless to speculate why that exception should have been made, but in view of the far-reaching character of the enactment of 1919, it may well be that the Legislature believed that where the more intricate question whether a scheme, not " under " the Act, was " in consequence of " it, was raised it would save time, trouble and expense to have it determined by the Electricity Commissioners who ex hypothesi must be well informed about the various transfer schemes.

Holding the view I have expressed as to the meaning of the section I think that in this case there is nothing to show that either the Minister of Labour or the referee appointed by him has in any way exceeded his jurisdiction or done anything in the absence of jurisdiction. If the construction of the section which I have indicated is not correct, the serious problem arises, who is to determine the question, if it is raised, whether the transfer scheme relied upon was or was not " under this Act " ? It cannot seriously be suggested that the Minister of Labour is to decide it, and it is difficult to suggest that it is for the Electricity Commissioners, seeing that to them is specifically assigned the more limited task of deciding whether the transfer was " in consequence of this Act." I think it is reasonably clear that the question whether the transfer scheme was " under " the Act is a part of the matter which is to be determined by the referee, and unless he answers it in favour of the claimant the claimant must fail, subject to this, that there may remain the question whether, although the transfer scheme was not " under " the Act, it was " in consequence of " the Act. It is said to be an odd thing that a referee should proceed to consider whether he has jurisdiction to entertain the claim. In my opinion the words of Lord Esher M.R. in *Reg.* v. *Special Commissioners of Income Tax* (1) are here in point. He

(1) 21 Q. B. D. 313, 319.

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there said: "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction." I think that the present case comes within those words, and that it is for the referee to inquire whether the facts are such as to enable him to proceed to determine the questions of liability and quantum arising in the reference. The fact is that the referee is in the position of an arbitrator, and if he does that which he ought not to do there are various ways in which his conduct may be reviewed. As I do not think that the Minister of Labour, in appointing the referee, or the referee in taking upon himself the burden of the reference has in any way exceeded the jurisdiction contemplated by the section, the rules must be discharged.

SHEARMAN J. I am of the same opinion. [His Lordship stated the facts as to the transfer of the undertaking and the claim put forward by the claimant, and continued:] The question now is, who is to decide whether the transfer of the undertaking was "under" the Act or not? For Torquay Corporation it is said that that question is to be decided by the Minister of Labour. It is said that the fact that the Minister is to appoint a referee or board of referees to hear certain other questions in dispute constitutes the Ministry the tribunal to determine this question, and that the function of the referee is to determine merely the quantum of compensation. I cannot so read the words of s. 16 of the Act of 1919. In my opinion this question is left to be determined by the referee. It is always a formidable argument to say that a referee cannot inquire and find his own

jurisdiction, but there are cases which establish that a tribunal may have to look into the facts to see whether it has jurisdiction and to decide whether it has jurisdiction or not. There is nothing in the Act to suggest that before the referee can enter upon his duty this question must be determined by the Court or the Minister. The referee's decision, however, is not final, for I think the words " referee or a board of referees " and the word " award " in s. 16 show that this is a reference to which the Arbitration Act, 1889, applies. There are therefore two reasons why I think these rules should be discharged, first, because the question is left to be determined by the referee, and secondly, because, being an arbitration, it is not the practice to issue writs of certiorari or prohibition to arbitrators, inasmuch as there are other adequate remedies for questioning their awards.

ROCHE J. I agree. Although this referee is, as I think, an arbitrator and within the Arbitration Act, I do not base my judgment upon this, for even if he were not an arbitrator any decision of his would not be enforceable against a party who objected to it, without recourse to the Court, and if there were grounds for alleging, and materials for proving, that the referee exceeded his jurisdiction or acted without jurisdiction, that would be a ground, in appropriate proceedings, for the person against whom it was made resisting its enforcement. There is therefore another remedy open to the applicants, and for that reason, in addition to the others given in the preceding judgments, these rules should, in my opinion, be discharged.

Rules discharged.

Solicitor for Minister of Labour: *Solicitor to Ministry of Labour.*

Solicitors for claimant: *Stanley & Co.*

Solicitors for Torquay Corporation: *Rollit, Sons & Compston, for H. A. Hield, Town Clerk, Torquay.*

J. S. H.

1923
Nov. 22.

GEORGE WILLS AND SONS, LIMITED *v.* R. S. CUNNINGHAM, SON AND COMPANY, LIMITED.

[1923. G. 1738.]

Contract—Sale of Goods—Delivery "unforeseen contingencies excepted"—Meaning.

A contract provided for the delivery of goods "unforeseen contingencies excepted." No particular source from which they were to come was stipulated. Unforeseen political complications prevented the supply of the goods from the source contemplated by the sellers, but it was not shown that the goods could not have been procured from other sources:—

Held, that the above clause did not protect the sellers from liability to deliver the goods.

ACTION tried before Greer J.

By contracts made in 1922 the plaintiffs, George Wills & Sons, Ld., agreed to buy from the defendants, R. S. Cunningham, Son & Co., Ld., certain steel rods, bars and plates at the prices named therein and within the times thereby prescribed as subsequently extended to May 31, 1923. No particular source from which the goods were to come was indicated. By the terms of the contract the delivery was subject to the condition "U.C.E.," which it was agreed meant "Unforeseen contingencies excepted," and subject to Continental conditions. The defendants failed to deliver part of the goods. They gave evidence that the French occupation of the Ruhr, from which they proposed to procure the goods the subject matter of the contract, had so disorganized industry there as to render the production and supply of those goods impossible. It was not shown that the goods could not be obtained elsewhere.

The defendants alleged that in the above circumstances the U.C.E. clause exempted them from liability to deliver.

Holman Gregory K.C. and *Fortune* for the plaintiffs.
Raeburn K.C. and *G. L. Hardy* for the defendants.

GREER J. [after dealing with other contentions, continued:] The defendants relied on another defence. The

contract between them and the plaintiffs was expressed to be "U.C.E." The meaning of these letters was admitted to be "unforeseen circumstances excepted" or "unforeseen contingencies excepted," and relying on that provision the defendants contended that they were relieved from liability to deliver the steel goods the subject matter of the contract. The "unforeseen contingency," the occurrence of which the defendants alleged relieved them from liability, was the disorganization of industrial Germany caused by the French occupation of the Ruhr. It appeared that the defendants were to get the goods which they had contracted to supply to the plaintiffs, or part of them, from Germany, and that they would be produced chiefly in the Ruhr district. It was said, probably truly, that the French occupation of this district would render the production and supply of these goods in the Ruhr district impossible. But it was said on behalf of the plaintiffs that although this might be perfectly true, it would have been quite possible to have obtained goods of the contract description elsewhere, though no doubt at an enhanced price, and as the defendants could not show the incorrectness of this contention, I am satisfied that it is the fact. The question is how the exception is to be applied to a contract which does not fix any particular source from which the goods are to come; had it done so the exception would have been much easier to interpret. It is a pity that merchants will continue to use shorthand expressions of this kind, if I may so term them, without any definition of them in the contract, and thus leave them to be interpreted by the Court. It is a difficult matter to determine what the expression was intended to mean in this contract, but I am bound to give it a meaning. After careful consideration I come to the conclusion that the words which the letters U.C.E. stand for mean that unforeseen circumstances must have arisen to render the performance of the contract impossible. It is not enough for the defendants to show that it was impossible for them to get the goods from the particular source they contemplated when entering into the contract. If they could have obtained goods elsewhere

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which would have satisfied the contract they were bound to do so. In the present case the defendants have failed to prove an absolute prevention, and there must therefore be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Kimber Bull, Howland, Clappé & Co.*
Solicitors for defendants: *Marris & Shepherd.*

W. L. L. B.

C. A.

1924

March 6, 24.

[IN THE COURT OF APPEAL.]

LANCASTER AND ANOTHER *v.* J. F. TURNER AND COMPANY, LIMITED.

Sale of Goods—Contract of Sale—Invoicing back to Seller—Seller's Default—Falling Market—Balance in Seller's Favour—Application of Clause—Settling Price—Time for ascertaining.

A contract for the sale of Japanese peas to be shipped from abroad contained a clause providing that disputes should be referred to arbitration; it also contained a clause, numbered 8 in the contract, providing that if the sellers made default in shipping or declaring shipment the contract should be closed by invoicing back the goods at such price, whether higher or lower than the contract price, as the London Corn Trade Association should determine; that the said Association should if requested by either party declare the closing price; that this price should be accepted as final by all parties, and that settlement should be made on the basis of that price by net cash not later than a certain date. The sellers failed to ship or tender any goods under the contract. They then applied to the Association to declare a closing price and gave notice to the buyers that they were doing so. The market price had fallen since the date of the contract. The Association declared a closing price at which if the goods were invoiced back to the sellers a balance would be found in their favour. The sellers claimed this balance; the buyers refused to pay it, and the dispute was referred to arbitrators, who awarded, subject to a special case, that the buyers should pay the balance to the sellers:—

Held (by Bankes and Sargant L.JJ.; Scrutton L.J. dissenting), that cl. 8 applied, notwithstanding that the sellers were the party in default, and that they were entitled to the balance in their favour after the goods had been invoiced back to them by the buyers at the closing price properly declared by the Association.

Held, also, that the closing price should be fixed with reference to the

date on which the buyers received notice of the sellers' inability to perform their contract.

Whether the clause would apply if the sellers' default were voluntary, or if the parties were merely gambling in differences, *quaere*.

Judgment of Rowlatt J. reversed.

APPEAL from the decision of Rowlatt J. on a special case stated by arbitrators.

By a contract in writing dated July 18, 1922, Messrs. Lancaster & Jones (hereinafter called "the sellers") sold to J. F. Turner & Co., Ld. (hereinafter called "the buyers"), on and subject to the printed conditions and rules indorsed on the contract, fifty tons of hand-picked Japanese green peas, 1922 crop, to be shipped by first-class steamer or steamers from a port or ports in Japan; shipment to be made by river $\frac{\text{and}}{\text{or}}$ ocean-going vessel or vessels and bill or bills of lading to be dated September, October or November, 1922, at the price of 33*l.* 5*s.* per 2240 lbs. including freight and insurance to Liverpool direct or indirect; payment net cash in London on arrival of the goods at the port of discharge in exchange for bill or bills of lading and policies of insurance.

The contract was in the London Corn Trade Association's form for Chinese and Manchurian Cereals, Steamer or Motor Vessels Parcels, London Terms. It began with the words "Bought for" Messrs. J. F. Turner & Co., Ld., instead of "Sold to." It provided that all disputes arising thereunder should be referred to arbitration according to the arbitration rule indorsed thereon.

The conditions and rules indorsed on the contract included the following:—

"8. Default. (A) If the seller defaults in shipping or declaring shipment the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as the London Corn Trade Association or persons appointed from time to time by them shall determine, such price to be accepted as final and binding by all parties. The Association shall if requested by either party declare the closing price, and settlement shall be made

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in accordance with and on the basis of such price by net cash payment not later than 30 days thereafter.

"(B) If the buyer defaults in the fulfilment of the contract the seller shall have the option of giving notice by letter or telegram (without prejudice to any other rights he may have) of reselling against the buyers who shall make good the loss if any sustained on such resale on demand."

"12. Arbitration. All disputes arising out of this contract shall be from time to time referred to two arbitrators one to be appointed by each party in difference, the two arbitrators having power to appoint a third. . . . ."

The sellers did not ship or tender any goods under the contract, but on January 27, 1923, wrote to the buyers: "We beg to advise you that we have received notice that sellers (1) have defaulted on the above parcel and as the peas were sold on a contract containing the invoicing back clause it will be necessary to apply to the London Corn Trade Association to fix a settling price under the terms of the contract. We are making the necessary application and will notify you immediately on receipt of their decision." In compliance with a request in that behalf the London Corn Trade Association gave a certificate fixing the settling price on December 30, 1922, of hand-picked Japanese green peas, 1922 crop, September, October or November shipment to Liverpool, at 26*l.* 17*s.* 6*d.* per 2240 lbs. A copy of this certificate was sent to the sellers, who on February 1, 1923, passed it on to the buyers, and on February 9 sent them a debit note for 318*l.* 15*s.*, the difference between the contract price and the settling price, and claimed this sum as due to them under cl. 8 (A) of the contract.

The buyers repudiated liability to pay any such sum. The dispute was thereupon referred to arbitration under cl. 12. The arbitrators found the following facts: (1.) The buyers were merchants engaged in the distributing trade and had entered into sub-contracts which would have given them a small profit on the contract price; (2.) the

(1) Meaning the original sellers. The appellants and respondents were not first sellers and buyers of the goods.

first intimation they received that the sellers were making default was by their letter of January 27, 1923; (3.) the sellers had bought from another party who had failed to ship or tender any goods or documents; (4.) no reason was given for this default; (5.) the market price steadily fell after July 18, 1922, until early in December, and by December 30 had reached 26*l.* 17*s.* 6*d.* per ton of 2240 lbs.; at the beginning of February, 1923, it was about 31*l.* per ton; (9.) the voyage from Japan to the United Kingdom takes about two months.

On June 22, 1923, the arbitrators, subject to the opinion of the Court, determined that cl. 8 (A) of the contract applied, and they awarded that the buyers should pay to the sellers 318*l.* 15*s.* and the costs of the award and the sellers' taxed costs of the arbitration. If in the opinion of the Court cl. 8 (A) of the contract did not apply they awarded that the buyers were entitled to 1*s.* damages from the sellers for breach of contract and that the sellers should pay the costs of the award and the buyers' taxed costs of the arbitration.

On the hearing of the special case Rowlatt J. gave judgment for the buyers on the ground that cl. 8 (A) did not apply so as to give the sellers an advantage when they were in default, and that the meaning of the clause was that if the sellers made default the goods were to be invoiced back to them at the settling price, whether higher or lower than the contract price, and that the buyers should be paid the balance if the settling price was higher, and not if it was lower.

The sellers appealed.

Raeburn K.C. and *Le Quesne* for the appellants. The learned judge was wrong in holding that where the seller makes default cl. 8 (A), the invoicing back clause as it is called, only contemplates payment to the buyer. The clause is clear and unambiguous in its terms. If the seller makes default, either party may request the London Corn Trade Association to declare the closing price. It does not say that the innocent party, or the party not in default,

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may apply; it expressly says that the Association "shall if requested by either party," which includes a seller in default, "declare the closing price"; and then settlement is to be made on the basis of that price by a net cash payment. It is quite general in its terms; it does not say that the net cash payment is to be made by the party in default; and it is unconditional. So the case of a seller in default requesting the Corn Trade Association to declare a settling price on a falling market, the declaration of a settling price lower than the contract price, a back invoice delivered by the buyer to the seller at the lower price, and a settlement by a cash payment by the buyer to the seller; these events are all within the purview of the clause. This clause, or the similar clause of the Produce Brokers' Association of London, has been in existence for over forty years, and innumerable disputes between sellers and buyers have been settled according to its terms. The Produce Brokers' Association's form came before a Divisional Court in *In re Gray and Boustead* (1) and in *Lang* v. *Crude Rubber Washing Co.* (2) In the latter case the clause and its object were recognized, and it was held that the only matter for consideration was the construction of the clause, and that its effect was only important for the purpose of ascertaining whether its ex facie meaning was really the meaning intended by the parties. They must be taken to know their business. Bankes J. said: "It is quite possible for business people to come to an agreement that in the event of a seller failing to complete his contract and giving the notice referred to in Rule IX. F"—of the Rules and Conditions of the General Produce Brokers' Association of London—"the buyer shall not be entitled to the ordinary remedy at law, but that in lieu thereof he shall, subject to certain allowances referred to in the rule, be entitled to retain only a sufficient portion of the purchase money to enable him to obtain elsewhere the commodity the subject matter of the contract, and that he must pay over any balance of the purchase price to the vendor." Two cases were relied on by the respondents, but both are

(1) (1892) 8 Times L. R. 703. (2) Unreported. December 6, 1911.

distinguishable. In *Roth, Schmidt & Co.* v. *Nagase & Co.* (1) the buyer had paid the price in advance. When the goods were tendered he rejected them, as apart from r. IX. (F) of the Produce Brokers' Rules he was entitled to do because the goods were not in accordance with the contract. He then claimed to recover the purchase money. This Court, affirming Roche J., held that r. IX. (F) did not exclude all remedies other than that which it provided, especially in view of r. VIII., and that by allowing something to the seller it did not deprive the buyer of his right to recover the purchase money. Again in *In re Bourgeois and Wilson* (2) it was decided by this Court that if through the seller's default the buyer has a right to special damages, for example for loss of profit, that right is inconsistent with a right of the seller to claim under r. IX. (F) and consequently that rule does not apply, where the buyer can show that he has suffered special damage. In the present case the buyers have suffered no special damage. When the appellants gave their notice of default the market price was below the contract price; the respondents' damages were merely nominal. Therefore neither *Roth, Schmidt & Co.* v. *Nagase & Co.* (1) nor *In re Bourgeois and Wilson* (2) applies, and there is no reason why r. 8 (A) should not be enforced.

Jowitt K.C. and *Gething* for the respondents. Rule 8 (A) can only apply where there is a market for the goods. Where there is a market the seller, if his vendor makes default, can himself procure similar goods to fulfil his contract with his purchaser; and he ought to procure them on the day on which he learns of the default, and at the market price on that day. That involves a purchase by him at the market price on that day and a delivery by him at the contract price, and results in a gain to him if the market has fallen and a loss to him if it has risen. Or else the purchaser can go into the market and buy the goods; and then if the market has risen he can charge the seller with the difference between the contract price and the market price. So far the rule of law and r. 8 (A) lead to the same result by different ways.

(1) (1920) 2 Ll. L. Rep. 36. (2) (1920) 25 Com. Cas. 260.

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In the first case the back invoice by the buyer to the seller represents the seller's purchase on the market to fulfil his contract; there will be a cash payment to him if the market has fallen and a cash payment by him if it has risen. In the second case, by the back invoice the buyer in effect charges the seller with the difference if the market has risen, and though he does not actually buy in the market, he credits himself with the market value of the goods. But where the market has fallen the rule of law and r. 8 (A), if it is to be taken literally, would seem to diverge; for then the law does not allow the defaulting seller to recover, but r. 8 (A), by allowing a defaulting seller to apply for a settling price, and by its further operation, would on its literal construction present the defaulting seller with the gain the purchaser should make by buying on a falling market instead of paying the contract price. If possible some meaning should be given to it which will lead to a less absurd result. The words "settlement shall be made" may reasonably be taken to mean "the seller shall pay the buyer." But whatever may be the meaning of the rule, it is based on the assumption that there is a market for the goods the subject matter of the contract of sale; otherwise there can be no back invoicing. And in this case there was no market on January 27 for September, October or November Japanese green peas. Consequently the respondents were entitled to special damages —namely, the profit they would have made on their sub-contracts but for the appellants' breach of contract, and r. 8 (A) has no application: *In re Bourgeois and Wilson & Co.* (1) The judgment of Rowlatt J. was therefore right.

Le Quesne in reply cited *Sharpe & Co.* v. *Nosawa & Co.* (2)

Cur. adv. vult.

March 24. The following written judgments were delivered:—

BANKES L.J. This is an appeal from a judgment of Rowlatt J. upon a special case stated by arbitrators, who

(1) 25 Com. Cas. 260. (2) [1917] 2 K. B. 814.

in paras. 13 and 14 of the case ask for the opinion of the Court in the following terms: "13. If in the opinion of the Court the invoicing back clause applies but the date of default is to be taken as at a date other than December 30, 1922, then we award and determine that the buyers shall pay to the sellers such a sum as shall represent the difference between the contract price and the price determined by the London Corn Trade Association on the date so fixed by the Court and the costs shall be paid as directed in the last preceding clause. 14. If in the opinion of the Court the invoicing back clause does not apply then in such case we award and direct that the sellers are not entitled to recover anything from the buyers and the buyers are entitled to 1*s.* (one shilling) damages from the sellers for breach of contract." The invoicing back clause is cl. 8 of the conditions and rules forming part of the London Corn Trade Association's form of contract known as the Chinese and Manchurian Cereals Contract, Steamer or Motor Vessel Parcels, London Terms. The clause is as follows: "(A) If the seller defaults in shipping or declaring shipment the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as the London Corn Trade Association or persons appointed from time to time by them shall determine, such price to be accepted as final and binding by all parties. The Association shall if requested by either party declare the closing price, and settlement shall be made in accordance with and on the basis of that price by net cash payment not later than 30 days thereafter." In the present case the contract was for the purchase and sale of fifty tons of hand-picked Japanese green peas, 1922 crop, to be shipped in Japan, and bills of lading to be dated September/October and/or November, 1922, at the price of 33*l.* 5*s.* including freight and insurance to Liverpool.

On January 27, 1923, the appellants, the sellers, intimated to the respondents, the buyers, that as their sellers had defaulted they could not fulfil their contract and intended to apply to the London Corn Trade Association under the invoicing-back clause to fix a settling price under the terms

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of the contract. Application was made and the Association was asked to fix the settling price as on December 30, 1922. The price was fixed by the Association at 26*l.* 17*s.* 6*d.* a ton, and on February 9 the appellants sent the respondents an invoice in the following terms: "Messrs. J. F. Turner & Co., Ld., Liverpool, bought of Lancaster & Jones. Terms: Nett cash. To 50 tons Japanese peas @ 33*s.* 3*d.* per cwt. 1662*l.* 10*s.* By 50 tons Japanese peas @ 26*s.* 10½*d.* per cwt. 1343*l.* 15*s.* 318*l.* 15*s.*—Default price fixed by the London Corn Trade Association, Ld." The respondents refused to acknowledge the claim and the parties proceeded to arbitration. The somewhat similar rule of the Produce Brokers' Association has been before the Court on several occasions. On each occasion counsel for the party objecting to an enforcement of the rule has contended that it is so unreasonable as to be contrary to natural justice, and on each occasion the Court has intimated that it is not concerned with the question whether the rule is or is not reasonable. If it is intelligible, and the parties have made it a term of their contract, the Court cannot relieve either party from the operation of the rule because it may not consider it reasonable. Speaking for myself I have already in one of the decided cases expressed a view that I did not share in the general condemnation of the rule. When prices are rising the working of the rule is a natural form of machinery by which to assess the damages payable by the seller. When prices are falling then is the time when buyers are tempted to take captious objections. It may well be that those who are acquainted with the particular branches of commerce in which these rules prevail consider that it is better to adopt a rule which will enable a buyer to obtain the commodity which he contracted to buy without paying more for it than he originally agreed to pay, even though it may result in a defaulting seller occasionally receiving part payment for goods which he never delivered, than to allow buyers a free hand in a falling market to endeavour to get out of their contracts. As I have already said it is no concern of the Court to consider whether the rule is reasonable or not. I merely say what I do in order to

indicate that I continue to entertain the opinion which I expressed in the *Crude Rubber Washing Co.'s Case* (1), when a member of the Divisional Court which decided that case. I was also a member of this Court on both the occasions when the rule of the Produce Brokers' Association was before the Court. In *Roth, Schmidt & Co.* v. *Nagase & Co.* (2), decided in January, 1920, the point in reference to the rule was whether it operated to exclude a claim for damages by a buyer who had properly rejected goods tendered to him under a contract which contained the rule. The second case was *Bourgeois' Case* (3), which decided that where a buyer can establish a claim for special damage owing to a default on the part of the seller to deliver the goods, the case is outside the rule altogether, and the seller cannot rely upon the rule to defeat the buyer's claim. The effect of these decisions is that under certain circumstances the rule is not applicable. No circumstances such as those in the cases referred to exist in the present case, and they have no application to it. Some day it may have to be decided what the position is if the default on the sellers' part was a voluntary default or the transaction a mere gaming and wagering contract, or if at the date of the declaration of default the contract goods were not procurable. The only two questions raised by the case are: (1.) Does the invoicing back clause apply? (2.) If it does at what date should the price be paid? On the first point the only question, as it appears to me, open to the buyers is whether the rule is intelligible in the sense that it is so expressed as to sufficiently clearly indicate its meaning. I think that it is. The event on which it is to come into operation is a default on the part of the sellers in shipping or declaring shipment. In that event a notional sale is to take place carried out by buyers invoicing back the goods contracted for at a price to be fixed as provided in the rule. The price so fixed is to be conclusive, and a settlement is then to be made. There being according to the operation of the rule two contracts of sale of the same goods in existence at the

(1) Unreported. (2) 2 Ll. L. Rep. 36.
(3) 25 Com. Cas. 260.

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same time at different prices, one by sellers to buyers and the other by buyers to sellers, the only possible settlement, as it appears to me, contemplated by the rule is that indicated in the rule—namely, a net cash payment by the party who appears in the transaction to be the debtor to the other. In my opinion the answer to the inquiry in the special case should be that the invoicing back clause does apply. On the question of the date of default it is, I think, clear that December 30 cannot be the correct date, and that the date of default should be a reasonable time after notice of default was given by the sellers, which presumably would be within a few days after January 27, 1923.

For the reasons given this appeal must in my opinion be allowed with costs here and below.

SCRUTTON L.J. (1) This is an appeal from a judgment of Rowlatt J. on a special case stated by lay arbitrators who hold that in a case where the sellers of goods have made complete default in delivery of the goods sold, the result is that the buyers are to pay to the sellers a sum which is in amount the same as if the sellers had tendered the goods for delivery and the buyers on a falling market had wrongfully refused to accept, whereupon the sellers had sold in the market and claimed the difference between contract price and market price. It is said that the contract the parties have made requires the buyers to pay the same sum to the sellers whether the sellers have made default in delivery, or the buyers in acceptance. Commercial men may make such an extraordinary contract, but the Courts are entitled to require clear language before they are convinced that such a contract has been made. As Lord Buckmaster says in *Beck & Co.* v. *Szymanowski & Co.* (2): "I agree . . . . that in a contract from which the ordinary rights of buyer and seller ensue an attempt to exclude either party from those rights by general terms applicable to all contracts can only be effected by the use of plain language." This is only

(1) The judgment of Scrutton L.J. was read by Bankes L.J.
(2) [1924] A. C. 43, 48.

repeating what was said by Fletcher Moulton L.J. and the House of Lords in *Wallis* v. *Pratt* (1), and by Lord Macnaghten in *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co.* (2), repeating his statement in *Elderslie Steamship Co.* v. *Borthwick.* (3)

The contract in the present case was to sell c.f.i. fifty tons of green peas shipped in Japan September/October and/or November, 1922, for Liverpool, payment against documents on arrival of the goods in Liverpool. The seller did not ship or buy afloat any such goods, but did not till January 27, 1923, say he was not going to deliver. He has got an award that the buyer shall pay him the difference between the contract price and the market price on December 30, 1922, that being apparently the date at which the seller should have delivered a provisional invoice, and did not.

This extraordinary result is said to follow from condition 8 (A) of the contract headed "Default." The system described in that clause of "invoicing back" has given the Court great trouble on previous occasions. I do not repeat my judgment in *In re Bourgeois and Wilson & Co.* (4), where it was held that a similar clause did not apply where the buyer was claiming special damage against the defaulting seller; and I only refer to *Roth, Schmidt & Co.* v. *Nagase & Co.* (5) cited therein, where it was held that a similar clause did not apply where the buyer was claiming back from a defaulting seller the price paid in advance.

In the present case where the sellers have delivered no goods, and are in default, it is said that, in the words of the contract, "settlement shall be made" by invoicing back from buyers to sellers the goods contracted for at a price determined by the London Corn Trade Association, though it is not stated at what date the price is to be fixed, or in what market. The sellers have not invoiced or delivered any goods to the buyers, and the buyers are not expected to deliver any goods to the seller; but in substance the contract

(1) [1910] 2 K. B. 1003, 1016; [1911] A. C. 394.
(2) [1909] A. C. 369, 375.
(3) [1905] A. C. 93, 96.
(4) 25 Com. Cas. 260.
(5) 2 Ll. L. Rep. 36.

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price is set off against the market price at some unspecified date. If that date on a rising market is when the buyer knows of the breach and ought to buy against the seller, this process will produce the figure of damages to which the buyer is entitled; but it is said the clause goes further and if the market has fallen, so that the buyer can buy at less than the contract price and suffers no damage but makes a gain, he ought to pay his gain to the defaulting seller, who will thus make some money by breaking his contract. I cannot find this startling result in the clause in question. The words "settlement shall be made" seem to me to point to settlement of the default and the claim for damages then being made by the seller, and not clearly or at all to indicate a payment by the buyer who is not in default. Any other construction seems to make the transaction simply a bet, in which the seller bets that the market price will have dropped below the contract price by the notional date of performance, and the buyer bets it will have risen, and the loser pays the amount by which the winner wins. If the parties have agreed this, there is nothing contrary to natural justice in it, though there may be questions of public policy as to betting; but I require to be satisfied that they have agreed anything so extraordinary, and I do not find any words which compel me to come to that conclusion. This is the ground on which Atkin L.J. and I myself declined to give this effect to a similar clause in *Bourgeois' Case* (1), and Bankes L.J. took the same view in *Roth, Schmidt & Co.* v. *Nagase & Co.* (2)

The authorities stand in this way. Three previous cases have dealt with a similar rule of the Produce Brokers' Association. In the first, the *Crude Rubber Case* (3), an arbitrator had ordered a buyer to pay to a seller, who had made default in one instalment of a contract, a sum calculated under the rule, and the Divisional Court declined to interfere with the construction of the rule by the arbitrator to whom the parties had agreed to go. I take this explanation of the case from the judgment of Bankes L.J. in *Bourgeois' Case* (1),

(1) 25 Com. Cas. 260. (2) 2 Ll. L. Rep. 36.
(3) Unreported.

he having been as Bankes J. a member of the Court. I notice that Hamilton J., who in the argument had twice taken the same view as I do, that you want very clear words to produce the surprising results supposed to follow from the rule, expressly says that he is not deciding a case where a seller without any excuse whatever simply says he does not choose to perform his contract; but will consider that case when it arises. I also notice that Bankes J., who used language which appears to cover this case, explains in *Bourgeois' Case* (1) that his language was wider than he intended and that the rule does not give the only remedy of a buyer against a defaulting seller. In *Roth, Schmidt & Co.* v. *Nagase & Co.* (2) the arbitrators under the same rule allowed the buyer to reject the goods and claim back the price from the defaulting seller, and the Court of Appeal affirmed the decision, holding that it required clear language to exclude a right to reject, and claim repayment of the purchase price, Bankes L.J. giving the leading judgment and affirming Roche J. Atkin L.J., as appears from the extract of his judgment cited in *Bourgeois' Case* (3), took a similar view. Lastly in *Bourgeois' Case* (4), where the buyer under the same clause claimed special damages for loss of a sub-contract, and the seller claimed a sum due on invoicing back under the rule, this Court negatived the latter claim, and allowed the former, again taking the view that the language was not clear enough to produce the startling results suggested. I see nothing in these authorities to lead me to alter the view I have already expressed, and I therefore agree with the result of Rowlatt J.'s judgment.

If I am wrong, I do not think the arbitrators' view as to damage can stand. The sellers only declared default on January 27. They then wrote to the Association sending them another contract and asking them to fix the price on December 30. No notice was given to the buyers of this. The contract sent was not their contract, and the date, December 30, was not any date relevant to them. I do not

(1) 25 Com. Cas. 267, 268.
(2) 2 Ll. L. Rep. 36.
(3) 25 Com. Cas. 278, 279.
(4) 25 Com. Cas. 260.

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understand whether the Association take any responsibility for the date, or why they fix prices without any notice to the person affected by them, especially if they are also fixing the date. The arbitrators then made an award on the basis of an invoicing back on December 30. It was admitted by Mr. Raeburn that this date could not stand, as on December 30 the buyers knew of no default and could not go into the market to replace it. If there is a liability on the buyers, it must in my view arise from an invoicing back about January 29, the date on which the sellers' notice of default was received and on which the arbitrators, from cl. 13 of the award, apparently intend that price to be fixed by the Corn Trade Association, though perhaps the parties will take the price which for some reason the arbitrators have found in cl. 11 (5.) of 31*l.*, which I gather would reduce the award by 206*l.* 5*s.* from 318*l.* 15*s.* to 112*l.* 10*s.* In that event the costs of the arbitration are provided for by the award, and there should be no costs before Rowlatt J. or in this Court.

But as appears above, I think that the appeal should be dismissed, judgment standing for the buyers for one shilling and the sellers paying the costs of the appeal.

SARGANT L.J. The first and principal question here is whether cl. 8 (A) of the conditions and rules of the London Corn Trade Association is limited in application to the case of a claim by a buyer against a defaulting seller, or extends also to and provides for a possible claim by a defaulting seller against a buyer. The latter construction is one that at first sight is somewhat improbable if not startling to the legal mind, which is wholly unaccustomed to a claim arising out of contract in favour of the party that has broken the contract. But there may be reasons of business convenience in favour of recognizing such claims, particularly in cases like the present, where there may be a whole series of successive and practically interdependent contracts, and default in one of these contracts may involve wholly blameless defaults in others of the series. And there is no doubt that under

somewhat similar rules the Courts have recognized the possibility of claims being validly made by defaulting sellers against buyers: see *Roth, Schmidt & Co.* v. *Nagase & Co.* (1) and *In re Bourgeois and Wilson & Co.* (2) It is therefore necessary to examine the language of these particular rules with an open mind, though no doubt from the point of view that it is for the defaulting seller to make out fairly clearly that they entitle him to claim notwithstanding his default.

Now when this is done the result in my view is to establish that r. 8 (A) on its true construction extends to and provides for a claim by a defaulting seller as well as for the more ordinary case of a claim against a defaulting seller. The words "if a seller defaults in shipping or declaring shipment" are quite general, and the consequence—namely, "the contract shall be closed by invoicing back"—is expressed in the most imperative way, wholly irrespective of any suggestion of blame and in marked contrast to the language of sub-cl. (B), which gives a right or option solely to the contractor who is not in default. And further, the subsequent words "whether higher or lower than the contract price" seem to clinch the matter, since, while the first alternative points to the more probable and ordinary case of a claim by a buyer who has lost by the nonfulfilment of a contract to deliver at a lower price and has to be compensated for the resulting loss, the second alternative is obviously one where the buyer so far from being prejudiced by the default is relieved from having goods tendered to him at a price higher than that at which he could obtain them in the market. And the subsequent provisions of sub-clause (A), such as that the price determined is "to be accepted as final and binding by all parties," and that the Association is to declare the closing price "if requested by either party," and that "settlement shall be made . . . . on the basis of such closing price," point clearly and I think unambiguously to a payment by the seller to the buyer or by the buyer to the seller, as the event may prove, wholly irrespective of the question whether the party

(1) 2 Ll. L. Rep. 36. (2) 25 Com. Cas. 260.

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to enforce and receive the payment has been in default or not. It is true that the phrase "settlement shall be made" is apt to suggest to a lawyer the settlement or adjustment of an enforceable legal claim, such as would arise against a defaulting party, and could hardly arise in his favour. But here I think that the phrase is used in a commercial rather than a legal sense, and refers to the closing of a transaction, as in the Stock Exchange phrase "settlement day."

Neither of the two authorities already referred to touches the vital question here of the construction of these rules. But the case of *Lang* v. *Crude Rubber Washing Co.* (1) before the Divisional Court in December, 1911, of which a full report has been placed before us, is a clear authority in favour of the sellers. There, as here, the claim was one by defaulting sellers against a buyer, where the market had fallen, and where the rules were very similar to those here, but apparently somewhat less stringent or imperative. And it was held, following apparently a previous decision of the Court of Appeal, that the sellers were entitled against the buyers to the market difference in the sellers' favour. The reasoning of Hamilton and Bankes JJ., as they then were, seems to me particularly important, and has since been approved, at any rate by Bankes L.J., in the subsequent case of *In re Bourgeois and Wilson & Co.* (2) It is not unimportant to observe that the rules then given effect to had been in use for many years, and that they have been continued to the present day, though apparently with some slight increase in clearness and stringency, the phrase "the contract shall be closed" being somewhat more imperative than "the seller shall close." In these circumstances I am of opinion that the present rules must to-day be held to be quite sufficiently clear and precise, and that they cover and provide for the present case, and are enforceable in favour of a seller though in default. Incidentally I can see nothing contrary to natural justice in the rules as so interpreted, though this question is, speaking strictly, not before us.

One or two minor objections on the part of the buyers

(1) Unreported. (2) 25 Com. Cas. 260.

have still to be considered. It is argued that there was no proper "invoicing back," as provided by the rules. But in my judgment there was a case under the rules for invoicing back, and there was (apart from the question of date, to be considered later) an ascertainment of price for the purposes of settlement. It is also argued that there was no default in "declaring shipment" since the contract did not provide for any such declaration. But reading the contract and the rules together the rendering of a provisional invoice appears to be a declaration of shipment within the meaning of the contract, otherwise an important part of cl. 8 (A) is merely nugatory. And, lastly, there is not here any special damage to the buyers either alleged or proved, or anything entitling them to more than nominal damages, and so the case of *In re Bourgeois and Wilson* (1) does not apply.

In my opinion, therefore, the sellers are entitled to recover against the buyers, but the amount to be recovered depends on the proper date for ascertaining the closing price. The date actually selected as the date of default—namely, December 30, 1922—has not been defended by counsel for the sellers and is wrong; the proper date is Monday, January 29, 1923, when notice of default seems first to have been received by the buyers, or a day or two after that date. This will diminish materially the difference payable by the buyers since the price of the goods had risen after December 31, 1922, though not to the price at which the original contract had been made. I agree with the result arrived at by Bankes L.J.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for North, Kirk & Co., Liverpool.*

Solicitors for respondents: *Crowder, Oldham & Vizard, for H. J. Sharman, Liverpool.*

(1) 25 Com. Cas. 260.

W. H. G.

C. A.
1924
March 26, 27.

[IN THE COURT OF APPEAL.]

STEPHENSON *v.* THOMPSON.

[1923. S. 1518.]

Bill of Sale—Excepted Documents—" Transfers of goods in the ordinary course of business of any trade or calling "—Growing Crop—" Goods "—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 8, 10.

An agreement for the sale of a growing crop is a transfer of " goods " within the meaning of s. 4 of the Bills of Sale Act, 1878, and is therefore excepted from the definition of " bill of sale " in that section as being a " transfer of goods in the ordinary course of business of any trade or calling."

Decision of Shearman J. [1924] 1 K. B. 608 reversed.

Brantom v. *Griffits* (1877) 2 C. P. D. 212 distinguished.

Evans v. *Roberts* (1826) 5 B. & C. 829 followed.

Dictum of Lord Hobhouse in *Tennant* v. *Howatson* (1888) 13 App. Cas. 489 dissented from.

Appeal from the decision of Shearman J. (1)

The facts of the case were admitted. A farmer, one Frank Brooks, sold a growing crop of potatoes at Long Sutton, Lincolnshire, to the defendant, Henry Thompson, who was also a farmer, for 3000*l.*, which was paid, the transaction being an out and out sale for cash. The agreement was dated May 12, 1922, and was neither attested nor registered as a bill of sale. On October 24, 1922, Brooks executed a deed of arrangement for the benefit of his creditors, and the plaintiff, Joseph Stephenson, was appointed trustee. The potatoes were at that time still in the ground or on the premises of Brooks, the vendor. The defendant was subsequently allowed to remove them without prejudice to the legal rights of the plaintiff, and the dispute concerned the proceeds of the sale of the potatoes, 944*l.*, balance remaining after deduction of expenses.

The plaintiff claimed the potatoes or their proceeds on the ground that they were the subject matter of an unattested and unregistered bill of sale, which under s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), was void as against him,

(1) [1924] 1 K. B. 608.

the potatoes being in the apparent possession of Brooks, the maker of the bill of sale. The defendant claimed the potatoes as purchaser.

Shearman J. held that the document of May 12, 1922, was a bill of sale which required attestation and registration under the Bills of Sale Act, 1878, and as it had not been so attested or registered it was void as against the plaintiff; and he gave judgment for the plaintiff accordingly.

The defendant appealed. The appeal was heard on March 26 and 27.

Clayton K.C., *Dyer K.C.* and *P. E. Sandlands* for the appellant.

E. W. Hansell and *W. N. Stable* for the respondent.

The arguments used in the Court below were repeated.

POLLOCK M.R. In this case a Mr. Frank Brooks, a farmer of Long Sutton, in Lincolnshire, by a written agreement dated May 12, 1922, agreed to sell to Mr. Henry Thompson, of Middleton Hall, in Norfolk, also a farmer, about 100 acres of potatoes which had been planted by the vendor on his farm situate in Terrington Marsh, in the county of Norfolk, for 3000*l*. The vendor undertook to cultivate and manage the potatoes and to hand over the resulting crop when they had been harvested to the purchaser.

Unfortunately, Mr. Brooks later on in the same year found himself in difficulties, and on October 24, 1922, he assigned his property to a trustee for the benefit of his creditors generally.

The question then arose whether the sale of the potatoes was valid as against the trustee under the assignment.

In order to determine the rights of the parties, a writ was issued on March 29, 1923, by which the plaintiff, the trustee, claimed a declaration that the agreement of May 12, 1922, was a bill of sale, and was void because it was not registered.

According to an agreed statement of facts the transaction was an out and out sale bona fide and for cash, and was made in the ordinary course of business as customary in the district.

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The question that arises is whether or not under the Bills of Sale Act, 1878, the agreement of May 12, 1922, ought to have been registered as a bill of sale, and whether, in default of registration, it was avoided by virtue of s. 8 of the Act.

Shearman J. thought that the matter was concluded by cases which were cited to him, and he said: "I think it is practically not open to me to decide otherwise than for the plaintiff unless I disregard decisions which, though not technically binding upon me, I am bound to regard with very great respect." From that judgment this appeal is brought, and we have to consider the short point which I have indicated above, a point which is of some importance.

Before I comment upon the Act I will make two general observations. We are invited to consider what is the meaning of the Bills of Sale Act, 1878, by a close scrutiny of that Act and its predecessor, the Bills of Sale Act of 1854, and we are asked to say that, inasmuch as there has been an alteration of the Act of 1854, we can, by superimposing the one Act upon the other, come to a conclusion as to what the Act of 1878 means. I do not however accept the principle that a sort of parliamentary interpretation is to be placed upon an Act by an examination of its clauses which differ from a previous Act, more particularly when the previous Act is repealed, as the Act of 1854 was repealed by s. 23 of the Act of 1878. Where there are two statutes which are to be read together, and both are in force, there the principle no doubt is not infrequently applied, that the subsequent Act gives what is called a parliamentary interpretation to the previous Act. But the converse is now suggested, and we are invited to scrutinize and to interpret the Act of 1878 in the light of clauses which have been finally repealed by the Act which we have to construe. Again, with reference to the Bills of Sale Acts, there are some important and valuable observations referred to by Brett J., in *Brantom* v. *Griffits* (1), made by the Court of Exchequer in *Gough* v. *Everard* (2), which may usefully be borne in

(1) (1876) 1 C. P. D. 349. (2) (1863) 2 H. & C. 1, 8.

mind. The Bills of Sale Acts were passed for the purpose of preventing fraud by means of concealed transfers of goods, thus allowing the person who has made the transfer to remain in possession of the goods, with the result that a possible creditor may be deceived in giving credit to a debtor. Pollock C.B. said, in *Gough* v. *Everard* (1), that "if any class of Acts ought to be construed strictly, it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate bona fide contracts. Where fraud does not exist, this Act should at all events receive no more than its true construction." It must be borne in mind that the decision which has been given might, instead of doing good, do a great deal of harm if instruments used in the ordinary course of business had their validity destroyed.

As I have pointed out, this was a bona fide sale made in the ordinary course of business, which is customary in the district.

Rather more than forty-five years have elapsed since the Act of 1878 was passed, and counsel for the respondent, who has had great experience in such matters, says that save and except one unreported case, he does not know of any where an ordinary instrument of sale, like the present, has been suggested to be a bill of sale so as to be invalid if not registered. It is of some importance to note that this decision, if it stood, would have a very serious effect upon the ordinary course of business in the district, because it would prevent what is a customary method of sale being adopted.

I now come to the question whether or not the judgment of Shearman J. is right, and whether or not we are bound by the cases which have been cited. The matter stands in this way: I have already adverted to s. 8 of the Act of 1878, which avoids unregistered bills of sale as against a trustee in bankruptcy. The interpretation of the Act is to be found in s. 4, and the expression "bill of sale" is defined in words which we have had read more than once. It is accepted by counsel for the appellant that, prima facie, the document of May 12, 1922, is one which would fall within the express

(1) 2 H. & C. 1, 8.

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definition in s. 4, and would, prima facie, be a bill of sale; but the section contains an exception to the wide embracing words with which it commences. The exception is: "but"—the expression "bill of sale"—"shall not include the following documents . . . . transfers of goods in the ordinary course of business . . . . of any trade or calling." I do not think it is suggested by the respondent that this document is not a transfer within the meaning of those words. We know, from the evidence, that it was made in the ordinary course of the business of the trade. Is it, then, a transfer of "goods"? It is said it is not, because we have to look at the second portion of s. 4, where a definition is given of the words "personal chattels," which are to mean "goods, furniture, and other articles capable of complete transfer by delivery and (when separately assigned or charged) fixtures and growing crops." It is said inasmuch as the words "personal chattels" are defined to mean growing crops, but the exception in the earlier portion of s. 4 only covers transfer of goods, without particular reference to growing crops, the exception is not wide enough to exclude the growing crops which are dealt with in the particular document, and in support of that argument attention is called to the difference between the wording of the Act of 1854 and the Act of 1878.

I think it is important in a case which may have a far-reaching effect, to be as clear as possible and not to base one's decision upon matters which are unnecessarily intricate. In my judgment, accepting the admission on both sides that the document of May 12, is, prima facie, a bill of sale, I am of opinion that this document is within the exception "transfers of goods in the ordinary course of business of any trade or calling."

The case which was relied upon by Shearman J. as having an opposite effect was *Brantom* v. *Griffits*. (1) I think it is clear that the judges there, and particularly Brett J., took as the basis of their decision that although the growing crops there referred to were goods, they were not goods capable of

(1) 1 C. P. D. 349.

complete transfer by delivery and, therefore, they were not within the Bills of Sale Act of 1854. But, in reading that judgment, I cannot put any other interpretation upon it than that both judges accepted the view that the growing crops were goods, although they were not capable of complete transfer by delivery and so did not fulfil the actual words which had there to be construed. The case went up to the Court of Appeal (1), and the judgment was there given by Cockburn C.J. He deals with the point in question and comes to the conclusion that the words of the Act of 1854 "personal chattels" are confined to goods capable of present delivery and removal, and he says it is impossible that there can be a present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser.

That case does not cast any light on the question whether or not the growing crops were goods in that particular case, but what it does decide is that growing crops do not fulfil the second limb of the sentence that they have to fulfil—namely, "capable of complete transfer by delivery." I cannot see that it really militates against the view that the potatoes in the present case were goods. The point as to whether or not growing crops are goods at all is, I think, decided in *Evans* v. *Roberts*. (2) There, there was a verbal agreement for the sale of growing crops of potatoes, and it was held that that sale was not the sale of an interest in or concerning land within the meaning of s. 4 of the Statute of Frauds, but was a contract for the sale of "goods, wares and merchandise" within the seventeenth section; in other words that Court, and a strong Court it was, held that growing crops were definitely within s. 17 of the Statute of Frauds, and consequently were "goods." That decision has held its position since the year 1826, and I think it is not only too late, but it would be very unfortunate, to upset it. I think it stands, and there is no reason why *Brantom* v. *Griffits* (1) cannot also stand; that is a decision upon the question

(1) 2 C. P. D. 212. (2) 5 B. & C. 829.

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whether or not growing crops fulfilled the words "capable of complete transfer by delivery."

There is another case, *Tennant* v. *Howatson* (1), in the Privy Council, with which I must deal. The decisions there are technically not binding upon this Court, although deserving of the greatest attention and respect. That was a decision on an Ordinance of Trinidad, which combined the two Bills of Sale Acts, of this country, of 1878 and 1882. The Bills of Sale Act, 1878, deals with absolute bills of sale, bills under which a complete transfer is effected. The Act of 1882 deals with conditional bills of sale, bills of sale which include mortgages on chattels and the like, but the Ordinance of Trinidad threw both those classes of instruments together for certain purposes, and the decision which was come to was that a bill of sale on crops actually growing at the time of execution was void for want of registration under the Trinidad Ordinance. The decision itself is not binding, nor does it appear to conclude the matter that we have to deal with in this case. Lord Hobhouse, however, in the course of his judgment says (2): "Their Lordships think that the word 'goods' in this context does not include growing crops. The expression 'personal chattels' is defined to mean 'goods, furniture, other articles capable of complete transfer by delivery and (when separately assigned or charged) fixtures and growing crops.' If it were not for this express definition growing crops would not be personal chattels, and the word 'goods' is not at all calculated to include them." For my part, I think that is a mistake. I do not agree with that statement; I cannot agree with it, because I think it was rightly decided in *Evans* v. *Roberts* (3), that "goods" does include growing crops. But it is important to observe that *Evans* v. *Roberts* (3) was not cited, and the matter does not appear to have been discussed, and it may well be that that observation was made alio intuitu and without careful consideration of what the decisions had been and how far it had been decided that "goods" included growing crops.

(1) 13 App. Cas. 489. (2) 13 App. Cas. 493.
(3) 5 B. & C. 829.

Having regard to that mistake, or slip, in the judgment, it seems to me that the reasoning does not apply to the construction of the Statute of 1878. Having come to the clear conclusion that there is really no authority for saying that the word "goods" does not include growing crops, and relying upon *Evans* v. *Roberts* (1), I am of opinion that the exception in s. 4 does except documents of this nature, and therefore they need not be registered under the Bills of Sale Act, 1878. The result is that I hold that the declaration made by Shearman J. ought not to have been made and that the document of May 12, 1922, is valid, and therefore the appeal should be allowed.

ATKIN L.J. I agree. [His Lordship stated the facts and continued:] It is not disputed that the document was a bill of sale—that is to say, that it did in fact transfer the property in the goods mentioned in it—and it is not disputed that it was a bill of sale of personal chattels within the definition of personal chattels in the Act, because personal chattels are defined in s. 4 of that Act to include, when separately assigned, fixtures and growing crops, and this was a growing crop. But what is said is that the transaction was within the exception in the definition of a bill of sale, because it is said that it is a transfer of goods in the ordinary course of business of any trade or calling. Prima facie, I think there can be no doubt at all that, on the agreed statement of facts, this is a transfer in the ordinary course of business of any trade or calling, and the question is whether it is a transfer of goods. It is said that by looking closely at the definition of "personal chattels" —there is no definition of "goods"—and "bills of sale" in the Act in question, one is forced to come to the conclusion that the word "goods" does not, in that Statute, include in any connection growing crops. I think that that contention is wrong. There can be no question, it appears to me, but that apart from some special use in a special Act of Parliament the word "goods" is wide enough to cover what are known as industrial growing crops. The word "goods," as defined

(1) 5 B. & C. 829.

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in the Sale of Goods Act, which it is to be remembered is a codifying Act, in terms includes, in the definition of "goods," industrial growing crops, and that definition is nothing new.

It is quite plain from *Evans* v. *Roberts* (1) that the term at that time was considered by the great lawyers who decided that case to include industrial growing crops, and there is further authority—namely, *Brantom* v. *Griffits* (2) and *Marshall* v. *Green*. (3) The latter was a case of the sale of growing timber, and the decision was that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract for the sale of land within s. 4 of the Statute of Frauds, and it was held that the case was within s. 17 of the Statute of Frauds. There are only two passages that I wish to read, and one of them incorporates a passage from a great authority. In giving judgment, Lord Coleridge C.J. says (4): "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of *Duppa* v. *Mayo*, p. 395: 'The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled, that, with respect to emblements or fructus industriales, etc., the corn and other growth of the earth which are produced, not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from

(1) 5 B. & C. 829.
(2) 2 C. P. D. 212.
(3) (1876) 1 C. P. D. 35.
(4) 1 C. P. D. 39.

the land in order to bring them to that state is not a contract for the sale of any interest in land, but merely for the sale of goods.' The propositions so laid down as applied to the present case, seem to afford a very clear and intelligible rule." Then Brett J., who also gave judgment in *Brantom* v. *Griffits* (1), says that "certain tests have been judicially agreed on with regard to this question, many, if not all, of which are contained in the note to *Duppa* v. *Mayo* in the last edition of Williams' Saunders, which has the authority of that profound lawyer, the late Sir E. V. Williams." Then he proceeds to deal with the matter. He talks about the cases where the vendor is to deliver and then the class of cases where the purchaser is to take the thing away himself: "In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section." In fact, I think there can be very little doubt that the word "goods" is one of the widest terms that can be used to describe personal property. In connection with the word "chattels"—goods and chattels—I think it is admitted that it covers in substance the whole of personal property and, as far as I know, nobody has been able to draw a real distinction between goods and chattels: they are over and over again stated as synonymous. A writ of fi. fa. is a writ directed to the sheriff to levy on the goods and chattels of the debtor, and it is quite plain upon that writ that a sheriff has to, and is entitled to, levy on growing crops. The right of an executor is to deal with the goods of a testator, and execution against an executor in respect of the debt of the testator would issue de bonis testatoris, after a judgment in these terms, and that expression "the goods of the testator" would include industrial growing crops. Therefore, the ordinary use of the word "goods" is clearly wide enough to cover industrial growing crops. Here you have an exception from the necessity of registration, which is put in for the purpose of protecting trade, in order that the provisions as to registration should not be a hindrance and an embarrassment to trade, and it is quite

(1) 2 C. P. D. 212.

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plain that there is a trade and always has been a trade in this country in industrial growing crops. Under these circumstances, I can see no reason for giving a meaning to the word "goods" which is much more restrictive than the ordinary meaning of the word in law, and a meaning which would defeat what appears to be the obvious intention of the Legislature. Of course, if we are driven by the words in the Act of Parliament to come to the conclusion that that restrictive meaning must necessarily be put upon the words, why, we must do so. I find nothing however in the Act of Parliament which drives me to that conclusion. I am not going to try and give a clear and distinct terminological meaning to all the different phrases that I read in the definitions in the Act of "bill of sale" and "personal chattels," because it is quite plain that the draftsman of that Act, following the drafting of the Act of 1854, had not in his mind to draw a clear distinction in the use of these phrases so that the words could not possibly overlap. For instance, one takes this phrase—and it appears to me upon the whole to be one of the very worst definitions that I have ever found or heard of—"the expression 'personal chattels' shall mean goods, furniture and other articles capable of complete transfer by delivery." Now chattels and goods mean the same thing. Furniture, quite plainly upon any meaning of "goods," is goods, and articles capable of complete transfer by delivery are goods. So that when that particular expression is used it appears to me to be quite impossible to draw an inference that by "goods" is there meant some species of chattels which is narrower than ordinary chattels and which does not include furniture and apparently does not include other articles—whatever that may mean—than goods and furniture which are capable of complete transfer by delivery. Again, there is the use of the word "goods," as is pointed out by Mr. Hansell, in the definition of "bill of sale." "Bill of sale," it says, "shall include bills of sale, assignments, declarations of trust without transfer." Then it says "inventories of goods with receipt thereto attached." Mr. Hansell says, and I think with truth, that those words "inventories of goods with receipt thereto

attached" are put in the Act of 1878, though in the Act of 1854 what is used is "goods," and further on they talk of assurances of personal chattels, and, therefore, goods must mean something other than personal chattels. If you can draw any logical inference from the words there, well and good, but I have pointed out that if "goods" in that phrase is to be treated as the same thing as "goods" in the definition of "personal chattels" and you are to exclude from "goods" the words that are used in collocation with that as meaning something different, then it would follow that "goods" in the definition of "bill of sale" does not include furniture and other articles capable of complete transfer by delivery. Now, if there is one thing that quite plainly is intended to be covered by "Inventories of goods with receipt thereto attached," I should imagine it would be furniture, and again you are driven to the conclusion that in this definition the word "goods" is used in its widest sense: I think it is used with the same effect as saying "Inventories of personal chattels, furniture and other articles capable of complete transfer by delivery," and so on. In these circumstances, the mere fact that you have in defining "personal chattels" said that it is to mean goods capable of complete transfer by delivery and then have added the words "(when separately assigned or charged) fixtures and growing crops," is no indication of an intention of the draftsman, and therefore of the Legislature, that those words specifically mentioned are not also included in the word "goods." It appears to me that it is not necessary to give to "goods" in the words "transfers of goods" a meaning which would cripple trade and would be entirely different to the ordinary meaning of the word "goods" when used in law.

Brantom v. *Griffits* (1) appears to me, so far from being an authority in favour of the respondent, to be an authority in favour of the appellant. It is a decision by at least two of the judges there that the word "goods" did include growing crops, but inasmuch as the growing crops were not capable of

(1) 1 C. P. D. 349; 2 C. P. D. 212.

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immediate delivery they were not within the definition in the Act of 1854.

The only other case which I need mention is *Tennant* v. *Howatson* in the Privy Council. (1) It is not necessary for us to say whether that case can be supported or not, because it is not binding upon us, but it can well be supported upon the grounds which, I think, are given in the judgment—namely, this was not a transfer within the ordinary course of trade. But Lord Hobhouse did say that if it were not for this express definition growing crops would not be personal chattels, and the word "goods" is not at all calculated to include them. Unless that is meant to have express reference to the actual words of the ordinance there under discussion, it appears to me, with the very greatest respect, that that expression does not in fact convey the meaning of those words according to established authority, and I do not think the case can be cited as authority for the proposition which apparently is contained in that particular phrase. I think this transaction is at any rate within the protecting words in the Bills of Sale Act. A transaction of this kind never has been and never was intended to be within the Bills of Sale Act, and I think, therefore, the appeal should be allowed.

SARGANT L.J. I am of the same opinion. The question here is whether this agreement for the sale of potatoes comes within the phrase "transfers of goods in the ordinary course of business of any trade or calling," those words denoting an exception from the expression "bill of sale" as defined by the Bills of Sale Act, 1878.

Now, that all the terms of that definition except the phrase "goods" are amply fulfilled in this case appears by the admissions that have been made, and therefore this agreement must come within the exception, unless we are to hold that "goods" in that phrase does not extend to and include growing crops. Well, apart from the Act itself, there can be no question, I think, that "goods" would include growing crops. Growing crops, of course, pass to the executor as

(1) 13 App. Cas. 789.

against the heir. And further, to refer to one case only, in *Evans* v. *Roberts* (1), it has been held that growing crops are within the phrase "goods and merchandise" in the Statute of Frauds. Apart therefore from some special language in the Bills of Sale Act itself, it seems to me that we are driven to the conclusion that these words are satisfied by a sale of growing crops.

The learned judge has come to the conclusion that "goods" does not include growing crops under the previous legislation, on the strength of *Brantom* v. *Griffits*. (2) With great respect to the learned judge, I think that he has misapprehended the trend of the reasoning of the Court of Appeal in that case. Whether it amounts to an actual decision, or not, that growing crops are goods, it seems to me to be, at any rate, a recognition of the view that prima facie growing crops are within the expression "goods." The actual decision was based upon the other words in the definition of the Act, on the ground that growing crops were not capable of complete transfer by delivery. So far, therefore, as that case is concerned, it seems to me to support the view of the appellant rather than that of the respondent. That being so, we have to consider whether there is any such special language in the Act of 1878 as would prevent the broad prima facie meaning being given to the word "goods" so as to include growing crops. In my judgment, there is nothing sufficient for that purpose. It is quite true that both in the definition of personal chattels and in the definition of bill of sale, we have a large number of words introduced by way either of definition in the one case, or by way of showing what the word includes in the other case. Those words seem to me to be a mass of verbiage thrown together without any very logical distinction between them. They overlap, in my judgment, in very many respects. It cannot possibly be taken that they are what may be called an accurate logical definition of a number of species which together make up the genus. To make such a definition would, I think, probably be beyond the powers of the

(1) 5 B. & C. 829. (2) 2 C. P. D. 212.

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draftsman of any Act of Parliament, and certainly this Act of Parliament, has not attempted to do anything of that sort. I think that any argument which is founded upon any supposed contrast between the various subjects or subject matters which are brought within these definitions is not to be relied upon. In my view, " transfers of goods in the ordinary course of any trade or business " is a phrase which has to be given its prima facie meaning, and it cannot be limited by any process of elaborate investigation of the special phrases used with regard to the definition of a bill of sale and with regard to the definition of the expression " personal chattels."

That being so, there is only one other matter that has to be noticed, and that is the judgment of the Privy Council in *Tennant* v. *Howatson*. (1) Now the main reason for the decision, the reason on which it was mainly based, was this: that the transaction in question was not a transaction in the ordinary course of business. But when giving the judgment of the Council Lord Hobhouse did undoubtedly, in the midst of stating the main reasons for his decision, add as a sort of pendant this remark: " If it were not for this express definition, growing crops would not be personal chattels, and the word ' goods ' is not at all calculated to include them." It seems to me that that was a mere dictum, and was a slip. I notice that no argument to that effect had been addressed to him by the counsel for the appellants, and neither *Brantom* v. *Griffits* (2) nor *Evans* v. *Roberts* (3) had been referred to at all, so that the matter was one that had never been agitated before the tribunal, and it was quite unnecessary for the purposes of the decision to make that statement. In my judgment, therefore, that must be looked on as a slip and as not being an authority to be relied upon. I do notice that in the two passages in Reed on the Bills of Sale Acts, where this case is referred to, it is not referred to as an authority for the wide proposition that the word " goods " does not include growing crops.

(1) 13 App. Cas. 789. (2) 2 C. P. D. 212.
(3) 5 B. & C. 829.

It is referred to merely as an authority for this, that in the particular case the transaction in question was not a transaction in the ordinary course of business.

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Appeal allowed.

Solicitors for the appellant: *Smiles & Co., for Mossop & Mossop, Holbeach.*

Solicitors for the respondent: *Smith, Rundell, Dods & Bockett, for Calthrop & Leopold Harvey, Spalding.*

G. A. S.

[IN THE COURT OF APPEAL.]

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SWEDISH CENTRAL RAILWAY COMPANY *v.* THOMPSON.

Revenue—Income Tax—Residence—Company incorporated in England—Registered Office in England—Business carried on Abroad—Dual Residence—Liability to Taxation—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

A company was incorporated in 1870 under the Companies Acts, 1862 and 1867, with the object of constructing and working a railway in Sweden. The registered office of the company was in London. In 1900 the company leased its railway to a traffic company for fifty years at an annual rent of 35,000*l.*, which was to be paid to the company in England. The company's articles were afterwards altered with the object of removing the control and management of the business of the company from England to Sweden, and it was admitted that the business of the company had since been and now was controlled and managed from the head office in Sweden. In 1920 a committee was appointed by the directors of the company to transact merely formal administrative business in the United Kingdom, such as dealing with transfers of shares in the United Kingdom, affixing the seal of the company to share and stock certificates, and signing cheques on the London banking account of the company. Since 1920 no meetings of the company had been held in the United Kingdom. All dividends had been declared in Sweden, and no profits had been transmitted to the United Kingdom except in payment of dividends to the shareholders in the United Kingdom. Since 1920 the annual rent under the lease to the traffic company had been paid to the company in Sweden:—

Held (by Pollock M.R. and Warrington L.J.; Atkin L.J. dissenting), that the company was resident in the United Kingdom and therefore

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liable to be assessed to income tax under Case V. of Sch. D. of the Income Tax Act, 1918, upon all its profits, whether remitted to this country or not. It might be that the company was also resident in Sweden, for a company might have a dual residence, but the fact that it was resident in this country rendered it liable to the tax.

Decision of Rowlatt J. affirmed.

APPEAL from a judgment of Rowlatt J. dated May 15, 1923, whereby he confirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts upon an appeal by way of case stated by the Commissioners. Assessments to income tax in the sum of 33,500*l.* for each of the years ending April 5, 1921, and April 5, 1922, were made upon the appellants, the Swedish Railway Company, Ld., under Case V. of Sch. D of the Income Tax Act, 1918, in respect of a rent paid to them under circumstances of which the following is a sufficient summary.

The company was incorporated under the Companies Acts, 1862 and 1867, in December, 1870, with the objects of (inter alia): (*a*) acquiring a concession for the construction of a railway between Frovi and Ludvika in the kingdom of Sweden and constructing the railway authorized by such concession; (*b*) maintaining and working the railway so to be constructed, and entering into any working or other arrangements with any other company for connecting the said railway with any other system; (*c*) leasing the said railway to any person, persons or company. The registered office of the company is situate at 11, Ironmonger Lane, London, E.C.3.

By an agreement dated February 10, 1900, and made between the company of the one part and the Traffic Company Grangesberg Oxelosund (hereinafter referred to as "the Traffic Company") of the other part the company leased to the Traffic Company its railway between Frovi and Ludvika for a term of fifty years as from January 1, 1900, with a right to either party to terminate the said agreement after the same had been in force for ten years. The sum of 33,500*l.* (in the said agreement called "an annual rent") was payable quarterly in advance by the Traffic Company to the

company, such quarterly payments to be made at the company's office in London. The said agreement of February 10, 1900, was entered into at Stockholm and was in the Swedish language.

At an extraordinary general meeting of the company, held at the company's office in London, on October 7, 1920, a resolution was passed, and afterwards duly confirmed, with a view to the alteration of the articles of association of the company, which were framed with the object of removing the control and management of the business of the company from England to Sweden. The Commissioners were satisfied that since October 2, 1920, the business of the company had been, and now was, controlled and managed from the head office at Stockholm, Sweden, and this fact was admitted on behalf of the respondent.

On October 22, 1920, at a meeting of the board of directors of the company, three members of the said board were appointed to be a committee under art. 45A of the amended articles of association, to deal with transfers of shares in the United Kingdom, attach the seal of the company to share and stock certificates, and to sign cheques on the London banking account of the company. The committee so appointed was empowered to transact merely formal administrative business in the United Kingdom.

Since October 22, 1920, no ordinary meeting, general meeting, or board meeting, of the company had been held in the United Kingdom. All dividends had been declared in Sweden, and no part of the profits of the company had been transmitted to the United Kingdom, except in payment of dividends to the shareholders in the United Kingdom. Since October 22, 1920, the annual rent of 33,500*l.* referred to above had been paid to the company in Sweden.

The Commissioners confirmed the assessments, and their decision was upheld by Rowlatt J.

The company appealed.

March 7, 10. *Latter K.C.* and *A. M. Bremner* for the appellant company. The question in this case is whether

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the company is "a person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom" within r. 1 (*a*) of Case V. of Sch. D to the Income Tax Act, 1918.

As to the question of residence see *Ex parte Breull.* (1)

The problem as to the domicil of legal persons or corporations is dealt with in Dicey's Conflict of Laws, 2nd ed. pp. 160–163, and 3rd ed. pp. 163–166. He there states (r. 19): "The domicil of a corporation is the place considered by law to be the centre of its affairs, which (1.) in the case of a trading corporation, is its principal place of business, i.e., the place where the administrative business of the corporation is carried on."

For the purposes of income tax the place of the head and seat of management controls the matter.

There is no dispute here as to the liability to income tax of the dividends of the company which come to this country.

The fact of the company being here for purposes of jurisdiction does not make it resident here for income tax purposes.

A company incorporated abroad, but having a branch and carrying on its activities here, is not resident here for purposes of income tax: *Bradbury* v. *English Sewing Cotton Co.* (2) Residence is the material thing and not nationality. The test is, where is the place of control?

[On this point they referred to the companies' articles of association: arts. 10, 10A, 32, 44, 45A, 48, 52, 54, 97, 137.]

We rely on the statement made by Huddleston B. in *Calcutta Jute Mills Co.* v. *Nicholson* (3), that a company resides for purposes of income tax where its real business is carried on. That view was approved by the House of Lords in *De Beers Consolidated Mines* v. *Howe* (4); see also *American Thread Co.* v. *Joyce.* (5) There cannot be one

(1) (1880) 16 Ch. D. 484, 486.
(2) [1923] A. C. 744.
(3) (1876) 1 Ex. D. 428, 453.
(4) [1906] A. C. 455.
(5) (1912) 6 Tax Cas. 1, 27, 31, 32; on appeal H. L. (1913) Ibid. 163.

principle for a foreign company and another for an English company as regards residence for income tax purposes.

The next case in point of time is *Mitchell* v. *Egyptian Hotels, Ld.* (1) Residence by the company in England was there admitted.

What the company is here complaining of is that it is being taxed on the whole of its dividends, notwithstanding that those payable to the Swedish shareholders do not come to this country. It is admitted that if they did so the company would have to pay tax upon them: Sch. D, Miscellaneous Rules, r. 7. As regards the registration of the company "the registration is no more than a circumstance to be borne in mind. In result it is in many respects comparable with the nationality of a natural person. For the purposes of income tax, nationality, if the person is resident here, is irrelevant": per Lord Wrenbury in *Bradbury* v. *English Sewing Cotton Co.* (2)

In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (3) the trade of the company was carried on partly in England and partly abroad, and it was held that for the purposes of income tax the company resided here: see also *New Zealand Shipping Co.* v. *Thew.* (4)

The true test of residence is where does the central management and control reside?

The registered office is only an incident in determining residence.

Bradbury v. *English Sewing Cotton Co.* (5) decides that where a foreign corporation comes to reside here it ceases to reside in its place of incorporation.

Residence and not nationality is the test of liability to income tax: see also *Daimler Co.* v. *Continental Tyre and Rubber Co., Ld.* (6)

As to the provisions in the Companies (Consolidation) Act, 1908, as to the register (s. 30), the registered office (s. 62),

(1) [1915] A. C. 1022.
(2) [1923] A. C. 744, 765.
(3) [1896] A. C. 31.
(4) (1922) 8 Tax Cas. 208, 222, 229.
(5) [1923] A. C. 744.
(6) [1916] 2 A. C. 307, 318, 319, 339.

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and winding up by the Court (s. 129), these are necessary incidents of registration. It is said that the secretary resides here. That is really not material. Then it is said that the company's seal is here; but it can only be used for sealing share and stock certificates. The "vital and organic functions" of the company are to carry on its business; but sealing certificates is not one of them.

It is true that the company has a banking account here; but that is not a ground for saying that it is resident here.

There is no authority for the test laid down by Rowlatt J. in the present case as to the vital and organic functions of the company. The learned judge has it is submitted applied a novel and erroneous test, which is in conflict with that laid down by Lord Loreburn in *De Beers Consolidated Mines* v. *Howe*. (1) Lord Loreburn there said: "The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills Co.* v. *Nicholson* (2) and the *Cesena Sulphur Co.* v. *Nicholson* (2), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

It is important to notice that both the cases referred to by Lord Loreburn were cases of English companies, and that the persons abroad were mere agents of the companies. It is conceivable that even for income tax purposes a company may have two residences. There is no ground for narrowing down the test laid down by Lord Loreburn. If that test be correct then there is no ground for the test adopted by Rowlatt J. in this case. *Mitchell* v. *Egyptian Hotels, Ld.* (3), has been much misunderstood. The case can be no authority on the question of residence, because residence was there admitted.

The company relies on the *De Beers Case* (4), and contends

(1) [1906] A. C. 455, 458.
(2) 1 Ex. D. 428.
(3) [1915] A. C. 1022.
(4) [1906] A. C. 455.

that for income tax purposes the company is not residing in this country.

As to residence for service of writ, it does not follow that because you have a residence here for some purposes you have it for all, including income tax purposes.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the respondent. This is a registered English company, and it has never been held that such a company is not resident here for income tax purposes. Nothing that was decided by Kelly C.B. in *Cesena Sulphur Co.* v. *Nicholson* (1) is contrary to the contention on behalf of the Crown in this case. The principles are clearly established in *De Beers Consolidated Mines* v. *Howe.* (2) There Lord Loreburn said: "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business." The law as to an individual is shown by *Cooper* v. *Cadwallader.* (3) The only question is whether the company is resident here. It is not relevant to consider whether it is also resident in Sweden. All that was decided in *De Beers Consolidated Mines, Ld.* v. *Howe* (2) was that the company was resident here. The company may be here for the purpose of service of process, but it does not follow that it is resident here.

[POLLOCK M.R. The service cases may be disregarded with reference to income tax. It is a question of presence in those cases rather than of residence.

WARRINGTON L.J. referred to *Attorney-General* v. *Jewish Colonization Association.* (4)]

That case assists the respondent, though not exactly in point. It was the case of an English company, though all its business was transacted abroad.

In *Goerz & Co.* v. *Bell* (5), a company registered abroad,

(1) 1 Ex. D. 428.
(2) [1906] A. C. 458.
(3) (1904) 5 Tax Cas. 101.
(4) [1901] 1 K. B. 123.
(5) [1904] 2 K. B. 136.

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but having its head office in London, where the meetings of the directors were held and where the directing and controlling power was exercised, was held assessable to income tax on the whole of its profits, as "a person residing in the United Kingdom." The only question is whether the company resides here. If it is a registered English company it is submitted that it must reside here. The point in this case has never been decided. There may be observations in the cases cited bearing upon it, but it is for this Court to decide it. The point is whether there is sufficient to say that the company is here; it does not matter if it resides in Sweden also.

Latter K.C. in reply.

POLLOCK M.R. [after stating the facts as above set out]. The question is thus directly raised whether an English company registered under the Companies Acts, carrying on business abroad, the control and management of which is also abroad, is liable to pay income tax, not only in respect of moneys remitted to England, which it is admitted would be liable to income tax under the rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, but also in respect of the full annual rent which is not paid in or remitted to London. Although, as stated, the business of the company is abroad, and the payment of the rent is made in Sweden, it is to be observed that not only is the company registered in England, but the Secretary of the company resides in London, and the seal of the company is kept at the registered office of the company in London. The company has a banking account in London. Transfers of shares are made in London and registered there. The accounts of the company are made up and audited in London. Dividends are paid to English shareholders and interest to English debenture holders from the registered office in London.

The relevant charging words of Sch. D are as follows: "Tax under this Schedule shall be charged in respect of:— (*a*) The annual profits or gains arising or accruing (1.) to any person residing in the United Kingdom from any kind

of property whatever, whether situate in the United Kingdom or elsewhere."

The question therefore is: Does the appellant company reside in the United Kingdom within the above charging words? There can be no question that the 33,500*l.* is rent within the meaning of Case V., r. 1, so that the assessment is correctly made if the company is resident in the United Kingdom.

Our attention was called to a passage in Dicey's Conflict of Laws, 3rd ed. p. 163, where he gives certain rules for determining what is the domicil of a corporation, and adds that "as regards the domicil of a corporation the distinction between residence and domicil does not exist." It is not easy to frame such rules, and it is less easy to apply them to the circumstances of a particular case. But although such rules may be of service and give some guidance, we have to follow decisions binding upon this Court.

In *Attorney-General* v. *Alexander* (1) it was decided that the Imperial Ottoman Bank was not liable to be assessed to income tax in respect of its whole profits "as a person residing within the United Kingdom," but was liable only in respect of the profits arising from its business carried on in England under the clause of the charging section applicable to non-residents. The Imperial Ottoman Bank was a corporation created by Turkish law. "If, therefore, this corporation can be said to be resident anywhere," said Kelly C.B., "I am of opinion that it must be resident in Constantinople, where alone it has its 'seat.'"

In *Cesena Sulphur Co.* v. *Nicholson* (2) and *Calcutta Jute Mills Co.* v. *Same* (2), it was held that both companies were liable to pay income tax on the whole of their profits wherever earned on the ground that they were residing in the United Kingdom. Both companies were incorporated under the Companies Acts, 1862 and 1867, though the Cesena Company was afterwards registered for all purposes in Italy. Their activities were entirely conducted abroad. The dividends required for the English shareholders were the only part of

(1) L. R. 10 Ex. 20, 30. (2) 1 Ex. D. 428.

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the profits of the Cesena Company sent to the United Kingdom. The Calcutta company had no office or other place of business in the United Kingdom, but for registration it had an address in London at the office of one of the directors. Huddleston B. (1) stated that he did not think the principle of law was really disputed, that the artificial residence which must be assigned to the artificial person called a corporation is the place where "the real business is carried on." The decision gives an illustration of the application of that term; for though for most—if not for all—practical purposes many persons might have described the companies as carrying on their real business, the one in Italy, the other in India, it was held that they were resident in the United Kingdom.

The question again arose and was decided in the case which has of late years dominated this field of law: *De Beers Consolidated Mines* v. *Howe*. (2) That company was incorporated and registered in South Africa. Lord Loreburn, whose speech embraced the opinions of the other learned Lords, adopted in terms the decision in *Cesena Sulphur Co.* v. *Nicholson* (3) and the *Calcutta Jute Mills Co.* v. *Nicholson* (3), that a company resides for purposes of income tax where its real business is carried on, where the central management and control actually abide. In accordance with the proper application of this test, the House held that the De Beers Company resided within the United Kingdom, because the real business was carried on, and the central management and control were in England. Lord Loreburn also emphasised that this question was one of fact to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

The Commissioners have held the Swedish Central Railway Company, Ld., liable, and, so far as that decision is one of fact, it is binding upon this Court if there is evidence to support it. But in my judgment, inasmuch as *Cesena Sulphur*

(1) 1 Ex. D. 454. (2) [1906] A. C. 455.
(3) 1 Ex. D. 428.

Co. v. *Nicholson* (1) and *Calcutta Jute Mills Co.* v. *Nicholson* (1) were definitely accepted as correct by the House of Lords, the light they throw upon the facts of the present case must not be neglected, nor can I accept the argument that the only test is the question, "Where is the real business carried on?" considered as a question at large. That test must be applied as interpreted in the decided cases. It is true the House of Lords rejected Mr. Cohen's proposition "that a company resides where it is registered and nowhere else." But if registration, per se, was thus held not to determine the question, equally the proposition that a company has one residence and one only—namely, where it is registered, was also rejected.

The existence of more than one residence for a company has been recognized in cases where the jurisdiction of the Courts over companies and service of a writ upon them has been in question: see *Carron Iron Co.* v. *Maclaren* (2) and *Newby* v. *Van Oppen.* (3) In an income tax case: *American Thread Co.* v. *Joyce* (4) Buckley L.J. says: "A corporation like an individual may have more than one place of residence." For an illustration that an individual may have more than one place of residence so as to render him liable to pay income tax see *Cooper* v. *Cadwallader.* (5) I cannot accept the view that for the purposes of the Income Tax Acts there cannot be a residence here of a company incorporated and registered here, even if by foreign law, or by the tests applied here to companies registered abroad, if those tests were used by the law of a foreign country, the same company might be held to be resident also in that foreign country.

Channell J. said in *Goerz & Co.* v. *Bell* (6), without deciding the question: "It is possible that the company may have two residences," one of which may be such as to expose it to liability to income tax. That was another case where it was held that a company registered abroad, but having a head office in London where the controlling power was

(1) Ex. D. 428.
(2) (1855) 5 H. L. C. 416, 450.
(3) (1872) L. R. 7 Q. B. 293.
(4) 6 Tax Cas. 31.
(5) 5 Tax Cas. 101.
(6) [1904] 2 K. B. 136, 146.

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exercised, is assessable upon the whole of its profits as being resident in the United Kingdom. I do not shrink from the view that a company may have two residences in the sense above suggested.

We were pressed with the decision and dicta in *Bradbury* v. *English Sewing Cotton Co.* (1) No doubt in that case Viscount Cave says (2): "The question therefore arises whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration, or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view." Lord Wrenbury distinguishes between residence and nationality, and decides that the former is the test relevant to liability to income tax. The question that had to be determined in that case was whether dividends received on shares of the American Thread Company were to be treated as income from foreign possessions. The American Thread Company had during the earlier years in question been held liable to pay income tax in respect of those dividends, because it was during those years resident here. Could the same sum be afterwards treated as income from foreign possessions? Viscount Cave stated, as above, the narrow question that was for decision—namely, what was the locality of the shares and stocks of the company? This decision does not, in my opinion, govern the present case, nor is it inconsistent with the view that a company may have more than one place of residence.

There is no case, unless it be suggested that *Mitchell* v. *Egyptian Hotels* (3) is one, which decides that an English company is not "resident" here. That case, however, is not a decision which affords any principle for guidance on this point. The direct admission was there made in para. 11 of the case that the company resided in England. Residence did not matter in that case, for the points raised, and successfully argued, were that only the moneys remitted to England could be taxed under Case V. of Sch. D, and that the whole

(1) [1923] A. C. 744. (2) [1923] A. C. 753.
(3) [1915] A. C. 1022.

of the profits were not taxable under Case I. The actual decision of the Court of Appeal, which held good, as the Lords were equally divided, was that no part of the carrying on of the trade was done in this country. Only the spending of the profits, made abroad, occurred over here. It is to be noted that Cozens-Hardy M.R. observed (1) that none of the previous decisions touched the case, and that Buckley L.J. commenced his judgment by saying (1): "This company is incorporated in the United Kingdom: it is, therefore, resident here."

As to the present case, the register of the shareholders is here, transfers of shares are made in London and registered there, and that may be not only an important but even a vital matter to the company, should there ever be a war between this country and Sweden: see *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2)

As I have said, if the question be one of fact, the Commissioners had, in my judgment, abundant evidence to come to the conclusion they did. But if, as I think, the question as presented by the Commissioners is one of law, then I am of opinion, for the reasons that have been given by Rowlatt J. and those that I have ventured to add, that his judgment is right, and must be affirmed.

The appeal must be dismissed with costs.

WARRINGTON L.J. The question in this case is whether on the true construction of the Income Tax Act, 1918, and in the events which have happened, the appellant company was, during the material period, "residing in the United Kingdom" so as to be assessable to income tax in respect of profits or gains arising or accruing from certain property in Sweden. The material period was that of the financial years 1920–21 and 1921–22. The assessment in question was made under Case V. of Sch. D in respect of income arising from possessions out of the United Kingdom. The Commissioners stated a case for the opinion of the Court, and their decision was upheld by Rowlatt J.; hence this appeal.

(1) [1914] 3 K. B. 132. (2) [1916] 2 A. C. 330.

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[The Lord Justice stated the facts of the case and continued:] The question on these facts is whether the company is residing in the United Kingdom within the meaning of the Income Tax Act, 1918.

This case for the first time raises the question whether the fact that the real control and management of an English company is exercised abroad justifies the Court in holding that it is not resident here. This, and every other English company, of course, owes its existence to the Act under which it is incorporated. All its proceedings are directly or indirectly regulated by it and derive their validity from it. It is provided by s. 62 of the Companies (Consolidation) Act, 1908, that every company shall have a registered office to which all communications and notices may be addressed, and notice of the situation of which and of any change therein must be given to the registrar. Under s. 131 the situation of the registered office determines the particular Court in which the company may be wound up. As already pointed out, the register of shareholders must be kept and must be open to inspection at such office. The conception of residence in the case of a fictitious person such as a company is, of course, artificial, as is the company itself, and the locality of the residence can only be determined by analogy. In the absence of authority—and I will deal with the authorities presently—I should be prepared to hold that, having regard to the statutory provisions above mentioned, the registered office is a residence of the company, and that it must be regarded as residing there at whatever other place, at home or abroad, it may also reside. For the purposes of the Income Tax Acts an individual may have more than one residence: *Cooper* v. *Cadwallader* (1); and I can see no reason for any distinction in this respect between an individual and a corporation: see per Lord St. Leonards in *Carron Iron Co.* v. *Maclaren* (2), and per Collins L.J. in *La Bourgogne.* (3) It is true that in these cases a company was held to have a residence—or, as it was called by Lord St. Leonards, a domicil

(1) 5 Tax Cas. 101. (2) 5 H. L. C. 416, 458.
(3) [1899] P. 1, 16.

—in this country for purposes of founding jurisdiction, but in the case of a corporation it seems to me that there is no distinction between such a residence and residence generally, because it is evident that a corporation could not, as an individual can, be caught, merely temporarily present in this country, and so served with process. Moreover, when the Act provides that all communications and notices may be addressed to the registered office, it seems to me to follow that the company must at all times be there ready to receive them. But even if I am wrong in the view that the registered office ought to be regarded as the statutory residence of the company, the facts in this case are sufficient to enable us to say that this company at all events is residing there. I am quite prepared to hold that the keeping and entering up of the register of shareholders and its production for inspection are acts done by the corporation itself and are vital functions of its being which can only be performed where it is itself resident, and that accordingly this company is, for that reason, resident in the United Kingdom. I think the other facts mentioned by Rowlatt J. point in the same direction, but I prefer to rely on those connected with the register, because they are matters as to which, under the provisions of the Companies Act, the company has no option.

I now turn to the authorities. The first general observation to be made is that there is no case in which it has been decided that an English company, the real control and management whereof is abroad, is not residing in the United Kingdom. The point has never called for decision. In *Mitchell* v. *Egyptian Hotels, Ld.* (1), the facts raised the point, but residence in the United Kingdom was admitted. In the Court of Appeal Buckley L.J. says (2): "This company is incorporated in the United Kingdom; it is therefore resident here." But this view was expressed without argument, and appears to be little more than an acceptance by the learned Lord Justice as correct of an admission on the part of the company. The question decided was that a trade controlled and managed in Egypt was not carried on here,

(1) [1914] 3 K. B. 118; [1915] A. C. 1022. (2) [1914] 3 K. B. 132.

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and the company, therefore, was not liable to be assessed to tax under Case I. of Sch. D, on the authority of *Colquhoun* v. *Brooks*. (1) The only other case in which the question of residence has arisen in reference to an English company is *Cesena Sulphur Co.* v. *Nicholson* (2), and there the Court came to the conclusion that the real and substantial business of the two companies concerned was carried on in England, so that it became unnecessary to decide the question which arises in the present case. It is true that Huddleston B. expressed the opinion that the registration in this country was only a circumstance to be taken into account, but it does not appear that there was any discussion as to the effect of the statutory provisions relating to the registered office, to which I have referred above.

The other authorities are cases in which foreign companies have been held to reside in the United Kingdom by reason of the real control and management thereof and of the business being in this country, and they are relied upon by the appellants because of the terms in which the views of the learned judges concerned in the decisions have been expressed, showing, as it is said, that the control and management finally determines the residence, not only of a foreign, but of an English company.

The leading case on this matter is *De Beers Consolidated Mines* v. *Howe*. (3) The Lord Chancellor (Lord Loreburn) there said: "I cannot adopt Mr. Cohen's contention." (That was a contention that the company resides where it is registered.) "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of

(1) (1889) 14 App. Cas. 493. (2) 1 Ex. D. 428.
(3) [1906] A. C. 455, 458.

English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in *Calcutta Jute Mills Co.* v. *Nicholson* (1) and the *Cesena Sulphur Co.* v. *Nicholson* (1), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

It is said here that applying what Lord Loreburn said was the true rule, the present company must be held to be resident in Sweden and not here. It is in these last three words that the fallacy, in my opinion, lies. The company may have a residence in Sweden—as to this I express no opinion, for it may involve questions of Swedish law—but I cannot see why it should not also have a residence in the United Kingdom, and if it has, that is sufficient for the present purpose: see Channell J. in *Goerz & Co.* v. *Bell.* (2) In this, as in other cases, it is, in my opinion, wrong to apply expressions of learned judges used in reference to the facts of the case before them, to essentially different facts, and thus give to them a meaning and effect which such judges themselves might well repudiate.

The question as to the residence in this country of a foreign company again arose in *American Thread Co.* v. *Joyce* (3), and was decided in accordance with the principle laid down in the *De Beers Case* (4), but Buckley L.J. recognized that the place of incorporation might be a place of residence, though not necessarily the only one.

New Zealand Shipping Co. v. *Thew* (5) is another example of the application of the same principle, and I should not refer to it but for the fact that some stress was laid on the use by Lord Buckmaster, in reference to *De Beers Case* (4), of the expression that what has to be ascertained is the

(1) 1 Ex. D. 428.
(2) [1904] 2 K. B. 136, 146.
(3) 6 Tax Cas. 1, 31.
(4) [1906] A. C. 455.
(5) 8 Tax Cas. 208.

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"real" residence of the company. For myself, I do not attach much importance to the expression, but it is right to say that it is not used by Lord Loreburn; what he says is one must ascertain where it "really keeps house and does business." Lord Buckmaster, however, uses another expression which, with all respect to him, is not quite accurate, and the inaccuracy may be of some importance. He says (1): "It has long been held that in order to determine whether a company is resident in one place or another the registered office of the company is only an incident in the evidence." What has in fact been said is that the place of incorporation is only an incident; the difference is material, because in the cases of the foreign companies the only fact found was the incorporation abroad, and there was no evidence as to any provisions of the foreign law as to registered office. In the only case of an English company in which the matter was discussed: *Cesena Sulphur Co.* v. *Nicholson* (2), Huddleston B. uses the expression "the place of registration," and, as I have already pointed out, the statutory provisions as to the registered office were not mentioned.

There remains one other case to which I ought to refer: *Bradbury* v. *English Sewing Cotton Co.* (3) The question decided in that case was whether profits derived from shares held by an English company in the American Thread Company earned during the period of its residence in England, as already mentioned, could, notwithstanding that fact, be treated as profits of the English company from a foreign possession, and it was held that the previous decision as to the residence of the American company was conclusive against the Crown. I have again carefully considered the speeches in that case, and particularly those of Lord Cave and Lord Wrenbury, and I cannot find in them anything inconsistent with the views I have expressed, always bearing in mind the fact that the company the residence of which they were discussing, was a foreign company.

For the reasons I have given, I think on principle this

(1) 8 Tax Cas. 229. (2) 1 Ex. D. 428.
(3) [1923] A. C. 744.

English company was during the material period residing in the United Kingdom, and there is no authority to the contrary. The decision of Rowlatt J. was, therefore, in my opinion, correct, and this appeal must be dismissed with costs.

ATKIN L.J. The Commissioners find that "the real control and management of the company is in Sweden," and, at the same time, find that the company is a person residing in the United Kingdom. The learned judge has held that a company may reside in two places and that there is evidence upon which the Commissioners could find residence in England. If for the purposes of income tax dual residence is possible, I agree with this and, for the reasons given by the learned judge and my brothers, I think that there was evidence upon which the Commissioners could find residence in England, unless for the purposes of income tax the residence of a limited company has a special meaning and can be only in one place. If only in one place, there is strong authority for saying that such place is where the central management and control is. For the purposes of deciding where the "residence" of an incorporated company is, we are told that we are to proceed as nearly as we can upon the analogy of an individual: *De Beers Consolidated Mines* v. *Howe* (1), per Lord Loreburn. An individual may reside in more places than one: *Cooper* v. *Cadwallader* (2), an income tax case. So, for other purposes than income tax, may a corporation: see *La Bourgogne* (3), where a foreign shipping corporation with its head office in Paris had an office here with its name painted up and did business through an agent. Lord Halsbury said: "It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a corporation can be resident—to use the phrase which Mr. Joseph Walton has so constantly referred to; they are 'here.'" In this sense it is obvious that a company's residence may be not singular or dual, but

(1) [1906] A. C. 458. (2) 5 Tax Cas. 101.
(3) [1899] A. C. 431, 433.

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multiple. In a recent case in this Court: *New York Life Insurance Co.* v. *Public Trustee* (1), we had to consider the position of a great American life assurance corporation who carried on business in its own name in most of the civilized countries of the world, and we held that a debt incurred by it in this country payable at its office in this country was situate here, both because the company was resident here and because it had localized the debt here. Herein lies the difficulty of the case, for if what I have called multiple residence is recognized here for income tax purposes, foreign corporations so resident and making part of their profits here will be liable to pay income tax on the whole of their profits wherever made, and we may presume that foreign nations will not be slow to follow suit in respect of English companies of similarly wide activities. For these reasons it has been argued that the Court would not recognize more than two residences, one what Lord Buckmaster in *New Zealand Shipping Co.* v. *Thew* (2) calls "the real residence," where the real business is carried on, the other the place where the company is incorporated and has a registered office where it exercises at any rate some of the functions of its corporate life, where the laws operate which brought it into existence, regulate its constitution and will regulate its dissolution. On the other hand, if a company may have more than one residence, it is not easy to see why its residences should be confined to two. The argument for the appellant was that it has been decided that the test of residence for income tax purposes admits of only one residence, the place where the real business is really carried on. It will be necessary to consider the decisions and dicta on this point.

In *Attorney-General* v. *Alexander* (3) the Imperial Ottoman Bank, who carried on a branch in London by a London committee, but were established in Constantinople by Turkish law and had their seat fixed there, were held not to be resident in the United Kingdom, so as to be assessable for all their profits wherever made. "London," said Kelly C.B., "is

(1) [1924] 2 Ch. 101. (2) 8 Tax Cas. 228.
(3) L. R. 10 Ex. 20.

not the chief seat of carrying on the business of the bank." In *Cesena Sulphur Co. and Calcutta Jute Mills Co.* v. *Nicholson* (1) there were two English companies concerned, both registered in England with registered offices in England. In both cases the actual operations from which the profits were made took place abroad, in Italy and India respectively. Kelly C.B. (2), answering the question what is the meaning of residence as applied to a joint stock company in this case, said: "The answer is—whether there may or may not be more than one place at which the same joint stock company can reside, I express no opinion at present—a joint stock company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it, are held, and where its governing body meets in bodily presence for the purposes of the company, and exercises the powers conferred upon it by statute and by the articles of association." Huddleston B., after saying that residence means not an artificial residence but actual residence and approving of counsel's argument that it means the place where the real trade and business is carried on, proceeds to negative the argument that registration of a company in England was conclusive of residence in England, stating that it is a strong circumstance analogous in an individual to the place of birth, and then proceeds: "But I do not think that the principle of law is really disputed, that the artificial residence which must be assigned to the artificial person called a corporation is the place where the real business is carried on. . . . . I have to ask myself where was the place where the real and substantial business was carried on." He proceeds to say that in both cases it was in England. The importance of this judgment is that the test is being applied to English companies registered here with registered offices here and subject to all the provisions of the Companies Act, 1862. I cannot see how Huddleston B.'s test admits of dual residence, or at any rate of any residence that is not determined by the question where is the real business carried on.

(1) 1 Ex. D. 428. (2) 1 Ex. D. 445, 454.

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In *Goerz & Co.* v. *Bell* (1) Channell J. had to deal with a company registered in the Transvaal, but with its head office and directing powers in this country. After saying that it was possible, though he did not decide the point, that a company might have two residences, he came to the conclusion that the company was resident in England, and if he had to decide between London and Johannesburg, he would prefer London. The next case is *De Beers Consolidated Mines* v. *Howe* (2), to which I have already referred. It is contended by the appellants that this decision determines the point in their favour. In that case the company was registered in the Cape Colony, its head office, by art. 3 of the articles, was at Kimberley, where, by the articles, all general meetings had to be held; its business was however controlled by board meetings in London, and the Commissioners had found that the trade or business was exercised by the company within the United Kingdom at their London office and that the head and seat and directing power were at the office in London. Lord Loreburn, after refusing to accept the contention that a company resides where it is registered and nowhere else, and after making the reference to the analogy of an individual which I have mentioned, says: "The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills Co.* v. *Nicholson* (3) and the *Cesena Sulphur Co.* v. *Nicholson* (3), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule." He then held that, applying this rule, the finding of fact of the Commissioners established that the company was resident in the United Kingdom. With this judgment, Lord Macnaghten, Lord Robertson and Lord Atkinson expressly agreed. It is truly said that this decision only relates to

(1) [1904] 2 K. B. 136. (2) [1906] A. C. 455, 458.
(3) 1 Ex. D. 428.

a company registered abroad, but for the purposes of testing the residence of a foreign company Lord Loreburn approves and adopts the test prescribed by the Exchequer Division for an English company. It can hardly be doubted that in the *Cesena Case* (1) the test adopted rejected incorporation and registered office as sufficient, and required investigation of further facts—namely, the place of the real business—and that the judgment in that case proceeded upon the basis that such test was the only test. If it is laid down in the lower Court as the only test of residence and is expressly approved and adopted in the House of Lords as the test of residence, I find it very difficult to avoid the conclusion that it was adopted as the only test. There is nothing in the judgment of Lord Loreburn which suggests that he had in his mind the possibility of dual residence involving some other test of residence than that which he laid down, and a test which if it were available would be different from and inconsistent with the test accepted from the Exchequer Division. The doctrine of residence of a trading corporation which appears to me to be approved by the decision in *De Beers Consolidated Mines* v. *Howe* (2)—namely, that the sole test is where is the business really carried on—finds support from dicta in several succeeding cases in the House of Lords. In *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co., Ld.* (3), one of the questions debated was whether the Continental company was an alien enemy. The company was registered in England and had its registered office in London and was formed for the purpose of selling in the United Kingdom motor-car tyres made in Germany by a German company. Its directors were resident in Germany and, since the war, at any rate, met in Germany. In the course of discussing the question of enemy character, Lord Atkinson said (4): "Strange as it may appear, the minute book of the company showing presumably from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing and, as I think,

(1) 1 Ex. D. 428.
(2) [1906] A. C. 455.
(3) [1916] 2 A. C. 307.
(4) [1916] 2 A. C. 318.

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rather unfortunate result of this omission is that the full facts, showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company operated regulating and controlling its important affairs were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a company like the respondent company, so far as such a fictitious legal entity can have a residence: *De Beers Consolidated Mines* v. *Howe* (1); and I can see no reason why, for the purpose of deciding whether the carrying on by such a company of its trade or business does or does not amount to a trading with the enemy, they should not equally determine its place of residence." Those words are obiter, but they apply the principle of *De Beers Consolidated Mines* v. *Howe* (1) back again, as in the *Cesena Case* (2), to an English company, and I do not think that Lord Atkinson, in saying that the things mentioned would "determine the place of residence," meant would determine one of the places of residence of a company.

In *New Zealand Shipping Co.* v. *Thew* (3) Lord Buckmaster had to deal with the case of a company registered in New Zealand with a registered office fixed by the memorandum of association in New Zealand and a register of members kept both in New Zealand and in London. He says (4): "Now it has long been held that in order to determine whether a company is resident in one place or in another the registered office of the company is only an incident in the evidence. In the *De Beers Case* (1) it was stated that you must find out what is the chief seat of management and the centre of trading of the company in order to ascertain what is its real residence; and again in the *Cesena Sulphur Co.* v. *Nicholson* (2) Kelly C.B. said: 'The real business is carried on where the central management and control actually abides.'" I notice two things in these sentences: first,

(1) [1906] A. C. 455.
(2) 1 Ex. D. 428.
(3) 8 Tax Cas. 228.
(4) 8 Tax Cas. 229.

that Lord Buckmaster refers to the two cases he mentions as laying down the same test, one of them being the case of an English company and the other of a foreign company; secondly, that he speaks of "the real residence," which presumably means the only residence.

In *Bradbury* v. *English Sewing Cotton Co.* (1) a company registered in the United States had for three years been taxed as resident in this country on the principle laid down in the *De Beers Case.* (2) The control and real residence was then transferred to the United States. In assessing the profits of a corporation holding shares in the American company, the question arose whether during the years the American company was resident in this country the English shareholder was receiving dividends on the shares as profits from a foreign possession. I think that the ultimate decision was based upon the ground that the revenue authorities having taxed the company during the three years as resident in England, could not thereafter be heard to say that during those years it was resident in America, and that the headnote in the Law Reports states the decision too broadly. But, in the course of his judgment, Lord Cave said (3): "The question therefore arises whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. 'Shares in a company,' said Sir James Hannen, in *The Goods of Ewing* (4), 'are locally situate where the head office is'; and I think this means that they are locally situate where the company's principal place of business is to be found. A share or a parcel of stock is an incorporeal thing, carrying the right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid upon it. It was decided in *Joyce's Case* (5) that during the first three years the American company was

(1) [1923] A. C. 744.
(2) [1906] A. C. 455.
(3) [1923] A. C. 753.
(4) (1881) 6 P. D. 19, 23.
(5) 6 Tax Cas. 1, 163.

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here for all the purposes of income tax; and, the company being here, I find it impossible to hold that its stock was abroad." I think that so far as that company is concerned, Lord Cave was expressly negativing the possibility of double residence, one in the place of incorporation and registration and one in the place where the principal place of business was.

It is necessary to refer to *Mitchell* v. *Egyptian Hotels, Ld.* (1) That was a case of a company registered in England with its registered office in London, which carried on the business of conducting an hotel in Egypt. It was admitted before the Commissioners that the company was resident in England, but as it was assessed on its full profits, it was further necessary for the revenue authorities to show that some part of the trade was exercised in England, otherwise, under the decision in *Colquhoun* v. *Brooks* (2), the company could only be assessed on such of its profits as were remitted to this country. The Commissioners found that the head seat and controlling power of the company were in England. But this finding was reversed in the Court of Appeal, who held that the control and management were in Egypt and that therefore the trade was solely exercised in Egypt. This decision was upheld in the House of Lords, the members being equally divided. In the result, therefore, we have facts which, on the principle of *De Beers Consolidated Mines* v. *Howe* (3), show residence abroad, and we have an admission that the company was resident here. And in addition to the admission we have the statement by Buckley L.J.: "The company is incorporated in the United Kingdom and is therefore resident here," a proposition which in its wide form is clearly inconsistent with the *Cesena Case.* (4)

All that it is necessary to say is that the case shows that the test which determines residence may in some cases determine also the place where the trade is wholly carried on; and it was in the latter aspect only that the Courts had to deal with the facts in view of the admission of residence in

(1) [1915] A. C. 1022.
(2) 14 App. Cas. 493.
(3) [1906] A. C. 455.
(4) 1 Ex. D. 428.

England made before the Commissioners and recorded by them in their findings of fact.

San Paulo (Brazilian) Ry. Co. v. *Carter* (1) is a case raising the same point as the *Egyptian Hotels Case.* (2) There a company registered in England owned a railway in Brazil, where the business operations took place. In that case also it was admitted that the company was resident in England and it was found that the control and direction were in London, where the business of the company was carried on under the direction of the directors. The decision of the House of Lords in that case was that the business was at any rate partially, if not wholly, carried on in this country, and the company were therefore not protected from assessment by the principle of *Colquhoun* v. *Brooks.* (3) No question of residence therefore arose.

In this condition of the authorities, we are asked to decide for the first time that for income tax purposes there are two tests of residence for corporations; one, place of incorporation, registered office and perhaps in addition some functional activity; secondly, place where the real business is carried on; and that therefore a company may have two residences. It appears to me that the *Cesena Case* (4) expressly negatives the first test, and that case has the authority of the House of Lords. The weight of authority seems to me to indicate that for income tax purposes there can only be one residence, "the real residence," and that is the place where the real business is carried on. In principle I should have said that the place of incorporation and of registered office is conclusive of residence, and that if one residence only is possible there is that residence. In other words, I should respectfully agree with the dictum of Lord Wrenbury in the *Egyptian Hotels Case* (2) above cited. But that view seems to me excluded by the *Cesena Case.* (4) Nor do I myself see any difficulty in saying that a corporation can reside in two places, but for income tax purposes, as I have said, that seems excluded by the authorities cited. It is plain, however,

(1) [1896] A. C. 31.
(2) [1915] A. C. 1022.
(3) 14 App. Cas. 493.
(4) 1 Ex. D. 428.

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that if a company may have, for income tax purposes, a dual residence, it has to be explained why, for the same purposes, it may not have multiple residence, and how multiple residence for purposes of jurisdiction is reduced, if it is reduced, to dual residence for income tax purposes. These problems, in my view of the case, must be solved elsewhere.

I feel constrained by authority to come to the conclusion that this appeal should be allowed and the assessment discharged.

Appeal dismissed.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondent: *The Solicitor of Inland Revenue.*

G. A. S.

1924 *May* 26, 27.

WILLIAMS *v.* BALTIC INSURANCE ASSOCIATION OF LONDON, LIMITED.

Insurance—Motor Car—Policy on Behalf of Owner and Friends driving Car with his Consent—Third Party Risks—Liability incurred by Friend when driving—Right of Indemnity enforceable by Owner—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48).

The owner of a motor car took out a policy of insurance by which the insurers agreed to indemnify him against damage to, or loss of, his motor car, and (by cl. 2) "against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for . . . . accidental bodily injury caused to any person."

During the currency of the policy, and while the car was being driven by the insured's sister, a licensed driver, with his general knowledge and consent, an accident happened which caused personal injuries to third persons, and in respect of which those persons recovered damages against her. The insured claimed that the insurers were liable under the policy to indemnify his sister and to pay to her or to him as trustee for her the amount of those damages:—

Held, (1.) that the terms of the policy applied to the event that happened; (2.) that the policy was an insurance on goods—namely, the motor car—within s. 4 of the Life Assurance Act, 1774, and only incidentally against third party risks, and did not come within the earlier

sections of that statute; and (3.) that the insurers were therefore liable to pay to the insured as trustee for his sister the amount payable under the judgment against her.

AWARD in the form of a special case.

Mr. Eric Bransby Williams (hereinafter called "the insured") insured his motor car with the Baltic Insurance Association of London, Ld. (hereinafter called "the company"), under a policy dated July 19, 1921, covering the period June 27, 1921, to June 27, 1922, by which they agreed (subject to the terms and conditions indorsed on the policy) to indemnify him against damage to, or loss of, the motor car from a variety of causes, against personal injury to himself, and (cl. 2) "against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for loss of life or accidental bodily injury caused to any person (other than a person driving the motor vehicle . . . . or a person in the insured's employment or a member of the insured's household). . . . ." The policy could be transferred to a new owner of the car provided due notice was given to the company. It also contained an arbitration clause.

On October 27, 1921, during the currency of the policy and while the car was being driven by the insured's sister, Miss Bransby Williams, a licensed driver, with the insured's general knowledge and consent, an accident happened which caused personal injuries to certain persons then in the car as passengers who were not in the insured's employment or members of his household.

An action was thereafter brought by those injured persons against the insured and Miss Bransby Williams to recover damages, and in that action judgment was entered in favour of the insured with costs, and for the plaintiffs against Miss Bransby Williams for 2900*l.* with taxed costs (which amounted to 262*l.* 12*s.* 3*d.*), making the amount of the judgment 3162*l.* 12*s.* 3*d.*

The insured thereafter made a claim upon the company to indemnify Miss Bransby Williams against all sums for which

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she became legally liable under the said judgment, and to pay the said sum of 3162*l.* 12*s.* 3*d.* to her or to him as trustee for her. This claim, being disputed by the company, was referred to three arbitrators, Mr. Leck K.C., Mr. Colam K.C., and Mr. Mackinnon K.C., who in addition to finding the facts already set out found also that in or about June, 1921, Miss Bransby Williams was informed of the terms of the policy that had been effected and, so far as it was an insurance on her behalf, ratified and approved the same.

The arbitrators were of opinion that the company were liable to pay to the insured as trustee for Miss Bransby Williams all sums paid or payable by her under the said judgment, and they so awarded.

The question for the opinion of the Court was whether on the facts stated and on the true construction of the policy and the Life Assurance Act, 1774, the award was right.

Schiller K.C. and *H. D. Samuels* for the company. First, the policy, on its true construction, is an agreement to indemnify the insured only in respect of any legal liability incurred by him when driving himself or when some one is driving for him, and as he has incurred no liability no question of indemnity arises.

Secondly, even if the question of construction is decided against the company, the insurance is avoided by the Life Assurance Act, 1774. (1) In the event that happened the insured had no interest. An insurable interest involves a

(1) Life Assurance Act, 1774, s. 1, makes null and void insurances on the life of any person or on any event, wherein the assured has no interest.

Sect. 2: ". . . . It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote."

Sect. 3 provides that no greater sum shall be recovered from insurers than the amount or value of the interest of the insured.

Sect. 4: "Provided always that nothing herein contained shall extend, or be construed to extend, to insurances bona fide made by any person or persons, on ships, goods, or merchandises; but every such insurance shall be as valid and effectual in the law as if this Act had not been made."

pecuniary interest: *Halford* v. *Kymer* (1), and in this case the insured had certainly none. He incurred no liability by what happened, and consequently he cannot recover. Nor had Miss Bransby Williams any interest in the event. She had no interest in the car itself apart from the bare possibility that she might be allowed sometimes to drive it. That was a mere chance, which gave her no interest: *Routh* v. *Thompson* (2); certainly not at the essential date—namely, when the policy was effected: *Stockdale* v. *Dunlop* (3); Porter's Laws of Insurance, 6th ed., p. 40.

[ROCHE J. In *Rhind* v. *Wilkinson* (4) it was decided that an averment of interest at the time of effecting the policy is immaterial and need not be proved; it is sufficient if the plaintiff be interested at the commencement of the risk.]

That was a question of marine insurance.

[ROCHE J. There is no difference in principle on this point between marine insurance and other insurances.]

Even if it can be said that Miss Bransby Williams had any interest her name ought to have been inserted in the policy, as required by s. 2 of the Act of 1774, and as it was not inserted no claim is maintainable in respect of the damages she has had to pay.

[They also cited *Lucena* v. *Craufurd* (5); *Wilson* v. *Jones* (6); and *Collett* v. *Morrison*. (7)]

Claughton Scott K.C. and *W. Shakespeare* for the insured. The policy is intended to cover all liability incurred by the insured or any licensed personal friend or relation who drove the car with his general knowledge and consent. With regard to the argument based on the Life Assurance Act, 1774, we say that that Act has no application. It was directed not against such an insurance as this, but against insurance on lives in which the person insuring had no interest, and against gaming. This insurance is primarily on the car itself; so much so that the policy and its benefits may be transferred

(1) (1830) 10 B. & C. 724.
(2) (1809) 11 East, 428.
(3) (1840) 6 M. & W. 224, 232.
(4) (1810) 2 Taunt. 237.
(5) (1806) 2 B. & P. N. R. 269.
(6) (1867) L. R. 2 Ex. 139.
(7) (1851) 9 Hare, 162, 176.

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to a new owner. Accordingly the policy comes within s. 4 of the Act of 1774, as being an insurance on "goods"—namely, the motor car. Only incidentally is it an insurance against third party risks in the same way as is the risk covered by the collision clause in marine policies. The insured had an interest in securing his sister's assistance in the driving of the car and in her protection from claims arising out of her driving. A motor-car owner cannot get his friends to drive unless they are to be indemnified against personal liability for accidents. Miss Bransby Williams had also an interest. She might be liable to the insured for damage caused to the car by her driving and might come, as in fact she came, under a legal liability to third persons. The policy was taken out with the view (inter alia) of her driving the car and, as is found, it was ratified by her. There was nothing to prevent the insured effecting the policy to protect himself and the other persons mentioned and he can claim as trustee for the latter: *Waters* v. *Monarch Fire and Life Assurance Co.* (1) Even assuming that the policy is not within the exception in s. 4 of the Act of 1774 it is, nevertheless, good, for the provision in s. 2 requiring the insertion of the names of those insured merely requires that the names should be capable of being inserted at the time the policy was effected.

[They referred to *Sunderland Marine Insurance Co.* v. *Kearney.* (2)]

Schiller K.C. in reply. The fact that the insurance against third party risks is contained in the same document as the insurance of the motor car does not make it a good insurance. If the third party risks insurance had been effected by a separate policy it would clearly have been struck at by the Act of 1774. It is said that Miss Bransby Williams had an insurable interest, because she might be expected to drive the car and might in so doing be liable to the insured and to third parties. There was no evidence that she might be expected to drive; and certainly that was not the object of the policy, the scheme of which was merely to protect the insured and any personal friend or relation for whose

(1) (1856) 5 E. & B. 870. (2) (1851) 16 Q. B. 925.

driving he was responsible. *Waters* v. *Monarch Fire and Life Assurance Co.* (1) was a very different case from this. The insurance in that case was upon chattels as such, and therefore the Act of 1774 had no application.

ROCHE J. The question submitted to me is whether upon the true construction of this insurance policy and the Life Assurance Act, 1774, the arbitrators' award is right or wrong.

The argument has travelled over a wide area and has raised many points of interest, but the real point of the case is, in my judgment, simple. [His Lordship stated the facts giving rise to the claim and continued :] The policy issued to the insured is, I observe, numbered 5606, so that presumably the company issue a number of policies in this form, and I am told that the clause under which the claim arises is a common clause in motor-car policies. That is of some importance, because the main contention raised before me and before the arbitrators has never apparently been raised before; and although that fact does not make it bad it shows that the novelty of the point is in the circumstances somewhat strange.

The material clause in the policy seems to me, in spite of the strenuous argument of Mr. Schiller to the contrary, perfectly plain and unambiguous. It says that the company agree to indemnify the insured during the period of the policy against various things, including (inter alia) "all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for loss of life or accidental bodily injury caused to any person," with certain exceptions. That clause would seem to cover Miss Bransby Williams' liability, inasmuch as she was a licensed person who was a relative of the insured and was driving the car with his general knowledge and consent, and she became liable to pay compensation for accidental bodily injury. I hold without the slightest hesitation that the plain meaning of the clause is that it

(1) (1856) 5 E. & B. 870.

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covers the very thing that happened. Mr. Schiller's contention involved a somewhat strained interpretation and the introduction of words. Mr. Schiller says that as the indemnity was to the insured, that is, Mr. Bransby Williams, all that is covered by cl. 2 are sums which he, the insured, may become legally liable to pay in consequence of driving or in consequence of the driving on his behalf and with his knowledge and consent, of a licensed personal friend or relative. In my opinion, the clause is not capable of that construction.

I now pass to a matter of greater difficulty, but here again I have arrived at a clear conclusion. It was said that this insurance, which now ex hypothesi is an insurance for and on behalf of Miss Bransby Williams as well as on behalf of Mr. Bransby Williams, is a gaming policy, and therefore is hit by the Life Assurance Act, 1774, which is directed against gaming and wagering. Before turning to the provisions of that statute it is perhaps permissible to look at the matter from the point of view of ordinary common life. A person insured under such a policy, knowing that his wife or son or daughter may have occasion, in order to conduct the necessary affairs of the household, to drive the car for the common benefit of himself and his family takes care, while protecting the car and himself, to protect also the liability his wife, son or daughter may incur to third parties. Such a person would be very much surprised to be told that he had by so doing taken out a gaming policy. Let us now see whether the statute justifies the conclusion contended for on behalf of the company. For a general discussion of the attitude of the law to insurance with or without interest and gaming I will simply refer to the very excellent and useful work of Mr. Macgillivray on Insurance Law, pp. 103 et seq. It is sufficient to say that there is nothing in the common law of England which prohibits insurance, even if no interest exists. It may be necessary to show interest, but there is no general prohibition in law. It is said, however, that the Act of 1774 prevents an insurance such as this. [His Lordship read the material sections and continued :] It is said that Mr. Bransby

Williams has no interest in Miss Bransby Williams's liability and therefore cannot recover; that Miss Bransby Williams, who might be said to be interested, cannot recover, because her name is not inserted in the policy; and that at all events s. 3 of the Act prevents Mr. Bransby Williams recovering anything beyond his own interest. That summarizes the argument, but the answer to it, in my judgment, is that given by Mr. Mellish in his argument in *Waters* v. *Monarch Fire and Life Assurance Co.* (1) There the plaintiffs, who were flour merchants and warehousemen, took out a policy against fire to cover goods in their warehouses and on "goods in trust or on commission therein." They had goods in their warehouse belonging to customers and on which they had a lien for charges. No charge was made to the customers for insurance nor were the customers informed of the existence of the policy. The warehouse having been destroyed by fire, the plaintiffs were held entitled to recover as trustees for the customers in respect of their goods. In his argument for the plaintiffs Mr. Mellish there said (2): "At common law, even if the contract were with persons having no interest at all, a contract of assurance was good. . . . . If therefore there is any illegality, it must be by statute. . . . . Stat. 14 Geo. 3, c. 48, is the only statute bearing on the subject." Mr. Mellish then read the sections of the statute, and with reference to s. 4 he said: "A common notion has prevailed that this proviso excepts only marine insurances; but there is no authority to that effect; the proviso does not except insurances on goods in ships, but insurances on ships, goods or merchandises." The Court there held that the policy was a policy on goods, and I am satisfied that in this case also the policy is on goods. A motor car is the subject matter of the insurance, and a motor car is a chattel or goods just as much as that which the warehouseman held in the case I have referred to. But it is said that the clause in this policy covering what are called third party risks is not an insurance upon goods. In my view that argument is based upon too narrow a construction of the statute. If the argument is

(1) 5 E. & B. 870. (2) Ibid. 877.

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right collision clauses in a marine policy would be within the mischief of the earlier part of the Act. Those clauses cover third party risks just as the clause in this policy does. This is an insurance on the motor car, although incidentally the policy contains provisions as to third party risks. If I am right in this, the rest of the argument becomes immaterial.

On the question of interest Mr. Claughton Scott said that Mr. Bransby Williams was interested in Miss Bransby Williams's immunity from claims, and that she was herself interested in her protection against claims; further that she was interested as the driver of the motor car in respect of the motor car itself. I do not decide these points, but I think there is a great deal in them. With regard to the last point it will be noted that in the Marine Insurance Act, 1906, a person is interested in a marine adventure who (inter alia) may incur liability in respect thereof.

The point also made by Mr. Claughton Scott that, even if the Act of 1774 applies, Miss Bransby Williams has been sufficiently named so as to be able to recover, on the principle certum est quod certum reddi potest, it is unnecessary to decide, but if it were necessary to decide it I should feel myself unable to hold that the name of Miss Bransby Williams was inserted in the policy within s. 2 of the Act.

The general argument that Mr. Bransby Williams cannot recover for Miss Bransby Williams because the latter cannot recover for herself, is based upon this, that the insured is Mr. Bransby Williams. That, I think, is begging the question. Mr. Bransby Williams is the insured in the sense that he is the person who effected the insurance, but it is an insurance for himself and the other persons mentioned in cl. 2, and, accordingly, the company's contract is to indemnify all such persons in the event of those things happening against which the insurance is effected. The principle of *Waters* v. *Monarch Fire and Life Assurance Co.* (1) in that matter also applies here.

I only desire to add this: there is a statement in Porter's Law of Insurance, 6th ed., p. 40, that "the interest must

(1) 5 E. & B. 870.

subsist when the policy is taken out." For that proposition a reference is given to *Howard* v. *Lancashire Insurance Co.* (1) Certain expressions in the report would seem to justify the statement just quoted of the learned author. The decision itself is, as far as I can judge, abundantly warranted by the facts, as it seems to have turned upon a representation of interest at the time the policy was effected and an avoidance of the policy because that representation was untrue. But there is no real support in that decision, and, so far as I am aware, there is none elsewhere, for the broad proposition that an interest must subsist at the time the policy is taken out. It was decided to the contrary as long ago as 1810 in *Rhind* v. *Wilkinson* (2), and the matter is discussed in Phillips on Insurance, 5th ed., s. 179.

I am glad to think that my conclusion as to the construction of the policy and the statute of 1774 is the same as that arrived at by the three learned arbitrators, Mr. Leck, Mr. Colam and Mr. Mackinnon, who are all highly competent to deal with such a matter as this. Their award in favour of the insured will stand.

Award upheld.

Solicitor for insured: *Harry Wilson.*
Solicitor for company: *W. C. Crocker.*

(1) (1885) 11 Can. S. C. R. 92.

(2) 2 Taunt. 237.

J. S. H.

1924
March 18.

COUNTESS WARWICK STEAMSHIP COMPANY, LIMITED *v.* OGG.

Revenue—Income Tax—Profits or Gains of Business—Deduction—Sum paid to cancel Contract for purchase of Asset—Capital or business Expenditure —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 209; *First Schedule, Sch. D, Rules applicable to Cases I. and II., rr.* 1, 3.

A limited company had as its objects to purchase and manage a steamship, to acquire or manage any other ship, to carry on the trade or business of a steamship owner and carrier, and to employ each of its ships in carrying goods, passengers and other things; and in pursuance of these objects the company purchased a steamship. By an agreement made in December, 1919, between a firm of shipbuilders and the representatives of the company the former undertook to build and sell and the latter to buy a steamship for 226,000*l.*, of which a first instalment of 30,000*l.* was to be paid on the signing of the agreement, and the balance in the instalments therein mentioned. The company paid the said first instalment and the work was proceeded with, but before any substantial progress had been made the company found that the cost of the vessel was so great that it could only be worked at a loss. In January, 1921, an agreement was therefore made between the company and the shipbuilders, and was afterwards carried out, by which, in consideration of the company paying the builders 60,000*l.*, to include the 30,000*l.* already paid, the shipbuilding agreement was cancelled:—

Held, that in assessing the annual profits and gains of the company's business to income tax for the material year under the Income Tax Act, 1918, no deduction should be allowed in respect of the said payment of 60,000*l.* or any part of it, inasmuch as that payment was a capital expenditure and not a business expenditure for the purpose of earning profits.

CASE stated by Commissioners for the General Purposes of Income Tax.

The appellants, the Countess Warwick Steamship Co., Ld., were formed as a company on March 6, 1906, the registered office of the company being at Cardiff, and its objects being (inter alia): (i.) To adopt and carry into effect an agreement dated March 3, 1906, made between William John Williams of the one part and James Allison Macfarlane for and on behalf of the company of the other part, for the purchase and management of a steamship. (ii.) To purchase or otherwise acquire or manage any other ship or steamship or steamships or shares in any other ship or steamships or steamship

company. (iii.) To carry on the trade or business of a steamship owner or owners, shipping agent, freight contractor, and carrier by land and water. (iv.) To employ each steamship of the company in carrying goods, wares and merchandise, troops, munitions of war, mails, passengers, cattle, parcels, and other things, and also in towing and rendering salvage services to vessels of every description.

In February, 1916, the appellants disposed of the ship which they had thus acquired and purchased in its place another ship called the *South Pacific*.

By an agreement dated December 10, 1919, and made between William Gray & Co. (1918), Ld. (thereinafter called "the builders"), of the one part and Messrs. Williams & Mordey of Cardiff (thereinafter called "the purchasers") of the other part the builders agreed to build and sell to the purchasers a steamship of the dimensions therein described for the sum of 226,000*l.*, the purchase money to be paid as follows: 30,000*l.* on the signing of the agreement and the balance by five equal instalments, as the building of the ship progressed, in manner specified in the said agreement.

The ship thus to be built was purchased by Messers. Williams & Mordey for the appellants.

On January 30, 1920, the agreement was signed, and 30,000*l.*, the first instalment of the purchase money, was paid by the purchasers to the builders. The building of the ship was proceeded with, but before any substantial progress had been made a great slump in the shipping trade came, and owing to the decline in trade and freights it became apparent to the appellants that the cost of the vessel was so great that it could only be worked at considerable loss, and the appellants therefore decided that they could not complete the purchase.

An agreement was thereupon made on January 21, 1921, and duly carried out between the appellants through Messrs. Williams & Mordey and the builders, by which in consideration of the appellants paying the builders the sum of 60,000*l.*, to include the sum of 30,000*l.* already paid and the additional sum of 30,000*l.*, of which 15,000*l.* was to be

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paid in cash and the remaining 15,000*l.* by six months' bills drawn on the appellants, the builders agreed to cancel the building agreement.

In the accounts of the appellants the said sum of 60,000*l.* was treated as a loss incurred in carrying on their business.

In respect of the year ending April 5, 1922, an assessment was made upon the appellants of 39,192*l.*, less 2575*l.* allowed for depreciation, under the Income Tax Act, 1918, First Schedule, Sch. D (1), in respect of the profits and gains from their business. In making that assessment the inspector of taxes for the district disallowed the said payment of 60,000*l.*, on the ground that it was not an expense incurred in carrying on the business, but a loss of capital.

On November 23, 1922, an appeal by the appellants against the assessment was heard by the said Commissioners.

It was contended on behalf of the appellants that the

(1) Income Tax Act, 1918:—

"FIRST SCHEDULE.

. . . . . .

"SCHEDULE D.

"1. Tax under this Schedule shall be charged in respect of:—

"(*a*) The annual profits or gains arising or accruing— . . . .

"(ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; . . . .

"2. Tax under this Schedule shall be charged under the following cases respectively; that is to say:—

"Case I.—Tax in respect of any trade not contained in any other Schedule;

"Case II.—Tax in respect of any profession, employment, or vocation not contained in any other Schedule; . . . .

and subject to and in accordance with the rules applicable to the said cases respectively.

"RULES APPLICABLE TO SCHEDULE D.

. . . . . .

"*Rules applicable to Cases I. and II.*

"1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed.

. . . . . .

"3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of:—

"(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation:— . . . .

"(*e*) any loss not connected with or arising out of the trade, profession, employment or vocation;

"(*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation; . . . ."

payment of the 60,000*l.* was a loss connected with or arising out of the trade carried on by the appellants and/or was wholly incurred in carrying on its business and should not be considered as a sum employed or intended to be employed as capital in their trade and was properly charged to the profit and loss account as compensation or damages paid for the cancellation of the contract, or alternatively that the second sum of 30,000*l.* paid for the cancellation of the contract was not a sum employed or intended to be employed as capital in the said trade, but must be regarded as damages paid to avoid a further loss of capital and therefore should be allowed in arriving at the profits of the appellants; and, further, as the only asset of the company was the boat known as the *South Pacific*, that if the said sum of 60,000*l.* had been charged to capital the boat must have been sold, that it would not have realized anything like 60,000*l.*, and resort must have been made to revenue, and that the said sum of 60,000*l.*, or alternatively that the second sum of 30,000*l.*, must be regarded as having been paid to prevent a loss of capital and in fact as having been paid for the purpose of enabling the appellants to continue trading, and therefore should be allowed in arriving at the profits of the appellants.

It was contended (inter alia) on behalf of the Crown that the payment of 30,000*l.* paid on the signing of the building agreement and the further sum of 30,000*l.* paid for cancellation of the agreement must be treated as capital expenditure; that neither the 60,000*l.* nor any part thereof was an allowable expense in arriving at the profits of the appellants under the Act of 1918.

The Commissioners were of opinion that having regard to the facts the payment of the whole of the 60,000*l.* was a capital expenditure and that it was not an ordinary business expenditure, but it was an expenditure made once for all and was not made for the purpose of earning profits; and they therefore confirmed the assessment.

The appellants appealed.

Sir John Simon K.C. (*E. H. C. Wethered* and *C. F. Entwistle* with him) for the appellants. In computing the annual

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profits and gains arising to the appellants from their trade or business in respect of which income tax may be charged under the Income Tax Act, 1918, First Schedule, Sch. D, both the sums of 30,000*l.* paid by the appellants to the shipbuilders as the consideration for the cancellation of the shipbuilding agreement should be allowed as a deduction. These sums were not expended or invested or intended to be expended or invested by the appellants as capital, but for the purpose of avoiding losses of income in their trade or business. If the shipbuilding agreement had been carried out and the appellants had paid the agreed price of the new steamship they would have sustained so great a loss of capital that they could not have continued to carry on business and earn profits and gains. Both these payments were necessarily incurred to enable the appellants to avoid a serious loss of capital and to continue trading. In computing the profits and gains of a business the deduction of sums such as these is not prohibited by any of the provisions of r. 3 of the rules applicable to Cases I. and II. under Sch. D. On the contrary, it is impliedly permitted by clauses (*a*) and (*e*) of that rule. Although there is not in the Act any express enumeration of deductions, the true view is that where the deduction is proper and necessary in order to ascertain the balance of the profits and gains it ought to be allowed provided it is not prohibited by any provision of the Act: per Lord Parker in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) The payment of these sums was a necessary incident to the profitable working of this business, and they were therefore properly deducted in arriving at the balance of the profits and gains of the business: *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (2) There is no distinction for this purpose between a payment made for earning profits and a payment for avoiding losses: *Hancock* v. *General Reversionary and Investment Co.* (3) If the appellants had insured against a loss of capital the premium would have been charged to revenue account, and the payments in question stand upon the same footing.

(1) [1915] A. C. 433, 458. (2) [1915] A. C. 433.
(3) [1919] 1 K. B. 25.

Sir H. H. Slesser K.C. (*R. P. Hills* with him) for the Crown. In computing the profits and gains of the appellants' trade or business for the purposes of income tax under the Act of 1918 no deduction should be allowed in respect of either of the payments of 30,000*l.* mentioned in the cancellation agreement. Each of these payments was an expenditure in respect of capital and not of income. The first of these payments was clearly a payment in respect of capital. It was intended to be and was in fact part of the purchase price of the steamship. A sum paid towards the purchase of a capital asset cannot be converted into a trading loss by reason merely of the fact that the transaction of sale is not completed. The second payment of 30,000*l.* was also a payment in respect of capital. If the appellants had carried out the shipbuilding agreement they would have been liable for the contract price of the steamship, and if they had failed to carry out that agreement without having entered into the cancellation agreement, they would have been liable to an action for breach of the former agreement in which the measure of damages would have been the price of the steamship, and in either case the payment which they would have had to make would have been a capital expenditure. They entered into the cancellation agreement in order to avoid that heavy capital expenditure, and the smaller payment of the second 30,000*l.* under that agreement having been made for that purpose was itself likewise a capital expenditure. If the first 30,000*l.* be regarded not as a part payment of the price of the steamship but as part of the consideration for the cancellation agreement, it stands upon the same footing as the second sum. These payments were not losses connected with or arising out of the trade or business of the appellants: *Inland Revenue Commissioners* v. *Warnes & Co.* (1); *Inland Revenue Commissioners* v. *Von Glehn & Co.* (2) The case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (3) is distinguishable, because the payment there in question was not made in respect of capital, but as a necessary incident of the working of the business.

(1) [1919] 2 K. B. 444. (2) [1920] 2 K. B. 553. (3) [1915] A. C. 433, 458.

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The deduction of these sums is expressly prohibited by r. 1, sub-r. 1, and r. 3 (*a*) (*e*) and (*f*) of the rules applicable to Cases I. and II. of Sch. D. and by s. 209 of the Act of 1918.

Sir John Simon K.C. in reply. The first 30,000*l.* was no doubt originally paid as part of the price of the steamship, but by virtue of the cancellation agreement the character of that sum was changed, and it became merely a payment in advance of the consideration money payable under that agreement in order to get rid of the heavier loss under the building agreement. The loss prohibited to be deducted by r. 3 (*e*) is a loss wholly or partially of the capital employed in the trading or adventure: per Lord Davey in *Strong & Co.* v. *Woodifield* (1), and not a loss of trading profits.

ROWLATT J. In this case the question is whether a particular payment made by the appellants was a business expenditure which can be deducted in computing the profits and gains of their business for the purposes of income tax or a capital expenditure which cannot be deducted. It is very difficult, as I have observed in previous cases of this kind, following the highest possible authority, to lay down any general rule which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of the possible cases, and I shall not attempt to lay down any such rule. In the present case very different views have been presented to the Court on behalf of the respective parties. The Solicitor-General, for the Crown, says that if in pursuance of the agreement of December, 1919, the steamship had been built and the purchase money paid by the appellants, the money so paid by them would have been an expenditure in respect of capital and not in respect of the profits and gains of their business; and that if the steamship had proved to be a bad investment, which could only be worked at a loss, no deduction in respect of the money so paid could have been allowed in computing the profits and gains of the appellants' business

(1) [1906] A. C. 448, 453.

for the purposes of income tax. He then says that the payment made by the appellants in consideration of the cancellation of that agreement, being in reality a payment made in order to get rid at a cheaper rate of an expenditure on capital account, is on the same footing, and that no deduction should be allowed in respect of it. Sir John Simon approaches the case from the other side. He says that if, under the original agreement, the steamship had been built and the purchase money paid by the appellants, then if the vessel had been bought at a sufficiently cheap price it would have earned profits for the appellants in their business, but if it had been bought at too high a price it would not have earned profits, but could only have been run at a loss. Therefore he says that the payment made by the appellants for the cancellation of the agreement, having been made for the purpose of anticipating and getting rid of a loss which they would otherwise have suffered in the future on revenue account, is not a loss on capital account but a loss on revenue account in respect of which a deduction should be allowed. I find it by no means easy to decide between these two ways of looking at the case. I think, however, on the whole, that the contention on behalf of the Crown ought to prevail. Applying the principle which, though hard to express, is well established and has received very many illustrations, and acting on the general trend of all the decisions, I conclude that the payment here in question should not be treated as a loss which can be brought into account in computing the profits and gains of the appellants' business for the purpose of income tax under Sch. D of the Act of 1918.

In my opinion, this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Stanley & Co., for Stanley, Wasbrough, Doggett & Baker, Bristol.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. R.

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March 24.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* BAILEY.

Criminal Law—Indecent Assault—Indictment containing many Counts—Each Count charging separate Assault on separate Person—Corroboration—Whether Evidence on one Count Corroboration of other Counts—General Verdict.

Where an indictment for indecent assault contains a number of counts, each count charging a separate assault on a different person, the jury should be directed not to return a general verdict but to return a verdict on each count, and they should also be warned to draw a careful distinction between the evidence on each count and the evidence on every other count and not to supplement the evidence on any particular count by looking at the evidence as a whole.

APPEAL from a conviction.

The appellant was tried at the Monmouth Assizes before Rowlatt J. upon an indictment which charged him in three counts with committing acts of gross indecency with three boys, and in sixteen other counts with indecently assaulting sixteen boys.

The appellant, who had hitherto borne an irreproachable character, was the headmaster of a school, at which school the boys whom he was alleged to have indecently assaulted were pupils. The ages of the sixteen boys ranged from ten to thirteen years.

The defence set up at the trial was a total denial of the charges alleged. It was also suggested that the appellant was unpopular with the boys and their parents, and that there was a conspiracy among the boys to make the alleged charges.

The judge in the course of his summing up to the jury said: "... You cannot as a rule convict people on charges of indecency with young people—male or female—as a rule you cannot convict them safely without some sort of corroboration, because otherwise a person cannot defend himself. A girl or boy comes and says that 'A man did that to me,' and the man says 'I did not.' He cannot defend himself as a rule, and therefore unless there is something to turn the

balance against him by way of corroboration, in practice a man in those circumstances gets off. In this case, taken one by one, it is a fair argument to say that these boys are not corroborated, except perhaps by each other, if that is corroboration. In one or two cases the boys said that they were both there, and so on. But speaking generally, taking the cases one by one, there is not much corroboration here, and also there is this to be said . . . . there is a great deal of want of cohesion about the evidence in respect of persons present on these occasions . . . . many of these boys say that so-and-so was present, and when the other boys come it does not appear that they say they were there . . . .

"What you have to do is, making allowance for all that, to ask yourselves: Well, now, when we have made allowance for all that, one by one, if the boys' stories stood alone, would we or would we not condemn any man on that? It is true that they have got mixed up about who were present, and it is true that they did not make complaints at the time, but you have got to take the whole case together and ask yourselves, Does it appear to us that there is nothing in this, or does it appear to us that it is borne in upon us that there is truth in it although there may be in parts exaggeration due to talk? . . . .

"Throughout the story there is perhaps this to be borne in mind. It cuts both ways. Mr. Vachell [for the prisoner] says here you have got sixteen witnesses not telling the same story, which would be a formidable case, but sixteen different witnesses telling different stories. It is true that they are not all testifying about the same event, and therefore they are not sixteen witnesses to prove one fact but sixteen witnesses to prove sixteen facts. But on the other side it may be fairly said, as Sir Reginald Coventry indicated in his opening, that when you find the story varying in its nature and in its detail though not in its main feature, varying in its language, it is sometimes in some cases very much grosser than it is in other cases, it may be argued, and it is fair to argue at any rate, that it looks as if it was spontaneous and genuine and not invented.

"What you have to do is this. You have to look at the

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case as a whole, and bear in mind that it is for the prosecution to satisfy you. Bearing that in mind you have to look at the case as a whole and ask yourselves whether it is borne in upon you that this is made out, or whether you think really and honestly that the prosecution have failed to make it out. . . . ."

The jury acquitted the appellant on the charges of gross indecency, but returned a general verdict of guilty on all the counts charging the appellant with indecent assaults, and the appellant was sentenced to fifteen months' imprisonment with hard labour.

The appellant appealed.

S. R. C. Bosanquet for the appellant. The conviction of the appellant cannot be supported. He was tried upon an indictment which contained nineteen counts, sixteen of which charged him with committing indecent assaults upon sixteen boys. The judge should have directed the jury to return a separate verdict upon each count. Blackburn J. in *Latham* v. *The Queen* (1) pointed out that "each count is in fact and theory a separate indictment." In a case where each count charged a separate and distinct offence regarding a different person, the judge ought to have directed the jury to look at each count separately and see whether there was corroboration of the charge in each count. The effect of the general verdict of guilty upon all the counts was that a verdict of guilty was returned in respect of one count upon which no evidence was given, as the boy was so frightened that he could not give evidence. In *Rex* v. *Norman* (2) it was held that in cases where there are several counts and several transactions the counts should be dealt with separately. Evidence which was admissible on one charge might not be admissible on another charge, and when the evidence on both charges was before the jury it was very difficult for the jury to separate them. The prosecution ought therefore to have elected as to the offence for which the prisoner should be tried. The judge did not direct the jury sufficiently as to the necessity for corroboration. The evidence given by one boy of the

(1) (1864) 5 B. & S. 635, 643. (2) [1915] 1 K. B. 341.

assault upon him is not corroboration of the story told by another boy of a different assault upon that boy. There must be corroboration of the evidence with regard to the particular assault charged. There was no corroboration of the boys' stories in the case of most, if not all, of the alleged assaults, and the jury should have been so directed. The jury treated all the cases in the mass instead of dealing with each count separately. A general verdict on the sixteen counts taken in these circumstances cannot stand.

[He was stopped.]

Hon. Sir Reginald Coventry K.C. and *J. H. Thorpe* for the Crown. The conviction ought to stand. If the trial had proceeded upon each count separately the prosecution would have been entitled to call the other fifteen boys in order to give evidence of prior and subsequent acts by the appellant in accordance with the decision in *Rex* v. *Armstrong* (1) and *Makin* v. *Attorney-General for New South Wales.* (2) The defence in the present case was that there was a conspiracy among the boys, and it was therefore necessary to put the case before the jury as a whole and to call all the boys in order to show that they were telling the truth and that there was no conspiracy. The jury convicted the appellant upon one count, as to which there was no case to go to the jury, but even though their verdict was unsatisfactory in that respect this Court has wide powers under s. 5 of the Criminal Appeal Act, 1907, and can quash the verdict of guilty in respect of that count and uphold the verdict as regards the other counts.

[AVORY J. Can this Court do that when there is a general verdict of guilty?]

There was corroboration of some of the indecent assaults. One of the boys made a complaint to his mother, which was corroboration within *Reg.* v. *Lillyman* (3) and *Rex* v. *Osborne.* (4) It is true that the evidence of one boy with regard to the assault charged in one count cannot be corroboration of the evidence of another boy with regard to another assault charged

(1) [1922] 2 K. B. 555.
(2) [1894] A. C. 57.
(3) [1896] 2 Q. B. 167.
(4) [1905] 1 K. B. 551.

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in a different count, but nevertheless the evidence would be admissible, as showing the consistency of the other boy's evidence.

The judgment of the Court (LORD HEWART C.J., AVORY and SANKEY JJ.) was delivered by

LORD HEWART C.J. The appellant was convicted at the Monmouth Assizes of indecent assaults on certain boys, and was sentenced to fifteen months' imprisonment with hard labour. He now appeals by leave against that conviction.

The indictment contained nineteen counts. Sixteen counts had to do with indecent assaults on sixteen boys, whose ages ranged from ten to thirteen years. The remaining three counts were for acts of gross indecency with three of those boys, but upon those counts the jury acquitted the appellant.

The grounds upon which Mr. Bosanquet has based the appeal against this conviction are four: First, that in such a case as this it was essential to direct the jury that each count should be separately considered upon its own merits; secondly, that upon the question of corroboration there was misdirection, or such a failure of direction as to amount to misdirection; thirdly, that the jury ought to have been directed that in at least the greater number of the cases there was an absence of corroboration; and fourthly, that the general verdict, taken in the circumstances in which it was taken, cannot be upheld.

It is not necessary that I should review in any detail the circumstances of this most odious and repulsive case, which must have greatly shocked every one concerned in the course of the investigation at the Monmouth Assizes. I do not wonder that both judge and jury should have been willing, if they could, to find a concise way of dealing with this mass of filth. But the question for this Court is whether the verdict can stand.

The general rule where there are many charges against a person is adequately and accurately stated in Archbold's Criminal Pleading, Evidence and Practice, 26th ed., p. 59: "Though not illegal, it is hardly fair to put a man upon his trial on an indictment containing forty counts, involving

several distinct charges of false pretences; for it would be almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others." The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing. That of course is only another way of saying that when a person is dealing with a considerable mass of facts, in particular if those facts are of such a nature as to invite reprobation, nothing is easier than confusion of mind; and, therefore, if such charges are to be brought in a mass, it becomes essential that the method upon which guilt is to be ascertained should be stated with punctilious exactness.

But what happened here? The appellant was the headmaster of a certain school, as to whom the evidence is that he had made himself in various ways unpopular—undeservedly so—not only with the boys, but also with some parents. The evidence for the prosecution was that this appellant, fifty-three years of age, a certificated teacher since about 1892, who had always borne, apart from this matter, an excellent character, had made a series of assaults upon schoolboys—indecent assaults and acts of gross indecency, and in the presence of other boys. On three of those counts—namely, the charges of gross indecency—the appellant was acquitted. But upon the rest of the counts, taken in bulk, he was convicted; and when one looks at the summing up, repulsive as no doubt it was to deal with a mass of material of this particular kind, not only were the jury not directed to consider each charge by itself, but there are undoubtedly passages in the summing up where it seems to have been conveyed to the jury that they might judge the part from the whole, and that they might reinforce the weakness of any particular part by looking at what appears at any rate to be the combined strength of the whole.

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It is said that no objection was taken to the trying of the appellant upon all the counts taken together. That may be so, and it may well be that, if objection had been taken by counsel for the appellant, the prosecution in such a case as this would have been put to their election, and they would have been asked to proceed on certain charges, omitting for the moment the rest of the charges. No such course as that was taken. The evidence was offered with reference to the indictment as a whole, and it was with reference to the indictment as a whole that at the conclusion of the trial the learned judge had the task of directing the jury. It was not merely a difficult, it was a profoundly repulsive task, and one can well imagine the kind of reason for which this case came to be dealt with in the particular way in which it was dealt with. If in the arguments which have been adduced before us counsel for the Crown had said that while this summing up was difficult to support in all respects, nevertheless it was apparent upon a close examination of the evidence that there were particular counts upon which, given an unexceptionable summing up, the jury must inevitably have come to the same conclusion, that argument must have given rise to serious consideration. No such argument has been addressed to this Court. On the contrary, it has been expressly urged more than once that no distinction is to be drawn between one count and another, and that it is right and proper that in weighing the merits, or, it may be, the demerits, of the evidence, with reference to any particular charge, the jury should bring into the scale by way, if need be, of makeweight, whatever was to be collected from the evidence upon any other charge.

Now that is a proposition which, in the opinion of this Court, cannot be sustained. So far is that from being the true conception of the law, that in such a case as this not only was it right that a careful distinction should be drawn between each count and every other count, but also, in view of the source from which the evidence came, it was right that a particular warning should be addressed to the members of the jury. Reference has been made to *Rex* v. *Cratchley*. (1) In that

(1) (1913) 9 Cr. App. R. 232, 235.

case Lord Reading C.J. said: "In our view, there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of boys of this age—twelve and under ten—who are concerned in such an offence." In the present case that course was not taken, nor were the jury directed to weigh with care the evidence with reference to each particular charge, being careful not to fall into the error of supplementing the evidence on any one charge by what might improperly be conceived to be helpful evidence upon some other charge.

It is said, on the part of the Crown, that, after all, this was evidence proceeding from boys at the same school, and that the unity of the school provided a nexus which made the evidence upon any count available upon any other count. It is a little difficult to follow that reasoning. One would have thought, on the contrary, that the very fact that this evidence did come from boys at the same school, especially if the master of that school was unpopular alike with boys and with parents, might have provided ground for additional caution and a stronger warning.

This Court has to deal with the evidence as it is, in the course which was actually followed at the trial, and, to leave out the other matters upon which Mr. Bosanquet has addressed us on behalf of the appellant, it appears sufficient to say that upon his last ground, namely, that this general verdict, taken in these circumstances and upon this direction, cannot be supported, the appellant is entitled to succeed. The consequence is that this appeal is allowed and this conviction is quashed.

Appeal allowed.

Solicitors for appellant: *John T. Lewis & Woods*, for *W. J. Everett, Pontypool.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

C. A.

1924

May 19.

[IN THE COURT OF APPEAL.]

POSTMASTER-GENERAL *v.* BECK AND POLLITZER.

Telegraph — Non-negligent Injury to Telegraphic Line — Liability for — "Person" — Telegraph Act, 1878 (41 & 42 *Vict. c.* 76), *s.* 8.

By s. 8 of the Telegraph Act, 1878: "Where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall not only be liable to pay to the Postmaster-General such expenses (if any) as he may incur in making good the said destruction or injury, but also, if the telegraphic communication is carelessly or wilfully interrupted, shall be liable to a fine not exceeding twenty pounds per day for every day during which such interruption continues." By s. 2: "The expression 'telegraph line' means telegraphs, posts, ... and also any . . . . apparatus . . . . used for the purpose of transmitting telegraphic messages."

The defendants' servant while driving their motor lorry along a public highway caused it, without any negligence on his part, to come into collision with a fire alarm post belonging to the Postmaster-General and thereby injured the post. In an action by the Postmaster-General under the above section to recover the expenses of making good the injury:—

Held, that the word "person" must be read, not as limited to persons who had special statutory rights in the highway which might come into conflict with the corresponding rights of the Postmaster-General, but in its natural and unrestricted sense as including all persons exercising their common law right of passage; and that the defendants were liable to make good the damage done.

Per Scrutton L.J.: *Quaere* whether the defendants would have been liable if the collision, instead of being directly caused by the act of their servant, had been brought about by the act of a third person forcing the lorry against the post, or by the lorry getting out of the driver's control.

APPEAL from a Divisional Court.

The action was brought in the City of London Court by the Postmaster-General to recover a sum of 15*l.* 16*s.* 9*d.* claimed to be payable by the defendants as compensation for injury to a fire alarm post under s. 8 of the Telegraph Act, 1878. The case was tried on the following admissions of fact: The defendants admitted: (1.) that at all material times the plaintiff maintained a telegraphic line on the pavement of the highway known as Galleons Road, North Woolwich, in the county of London, under the powers conferred on him by the Telegraph Acts, 1863 to 1922; (2.) that on

November 10, 1922, the servant of the defendants, acting in the course of his duty, drove a motor lorry along the said highway, and brought the said lorry into contact with a fire alarm post, which formed part of the said telegraphic line of the plaintiff, and thereby injured the said telegraphic line; (3.) that the expenses incurred by the plaintiff in making good the said injury amounted to 15*l.* 16*s.* 9*d.* The plaintiff admitted that neither the defendants nor their servant were guilty of any negligence.

The county court judge gave judgment for the plaintiff, and on appeal the Divisional Court affirmed his decision.

The defendants appealed.

J. B. Matthews K.C and *Thos. Scanlan* for the appellants. The word "person" in s. 8 of the Act of 1878 does not include ordinary members of the public exercising their common law rights of passage along a highway. It was intended to be limited to persons having certain statutory relations with the Postmaster-General, either the owners or occupiers of land over which his telegraphic lines pass, or street authorities or gas or water companies who have special statutory rights in the highway. The words in the Act of 1878 are by s. 2 to have the same meaning as in the Telegraph Act, 1863, at the date of which Act the telegraph undertakings were still the property of private companies. Throughout that Act the word "person," which is invariably associated with the word "body," is apparently given the limited meaning above mentioned. Sect. 3 defines the term "body" as including "a body of trustees or commissioners, municipal corporation, grand jury, board, vestry, company, or society, whether incorporated or not," and adds that "any provision referring to a body applies to a person." Sect. 5 deals with consents to the execution of works by the telegraph company to be given by "the person or body" whose consent is required; the only body specially referred to in that section being "a body having the control of a street or public road, or of the sewerage or drainage thereunder." In s. 7 there is provision for compensation to "all bodies and persons

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interested " for all damage sustained by the execution of the company's powers. By s. 8 the company are to cause as little inconvenience as possible to any " body or person " owning or using a pipe for the supply of water or gas. Sect. 13 provides for the consent of " any landowner or other person liable for the repair of any street " to the execution of works by the company in the street. In 1868 the telegraphs were acquired by the Postmaster-General. By s. 3 of the Act of 1878 provision is made for the reference to arbitration of disputes arising where consent to the execution of works by the Postmaster-General is refused by the " body or person " interested in the locus in quo. The word " agents " in s. 8, under which the present action is brought, does not refer to the servants of private persons, for the definition of " agents " in s. 2 of the Act of 1878 shows that the expression was meant to apply to servants of some public body having special rights in the street or other place. By s. 9 : " Where any undertakers, body, or person or their agents obstruct the Postmaster-General in placing, maintaining," etc., his telegraphic lines they shall be liable to a penalty. This provision would be superfluous if intended to apply to an obstruction by a private person, for that is already sufficiently dealt with by the law relating to malicious injuries to property. It is true that in the definition of " persons " and " agents " in these Acts the word defined is said to " include " not to " mean " what follows, but it is evident that the attention of the Legislature was directed to the particular class of persons said to be included rather than to any others. It is improbable that the Legislature intended to make ordinary members of the public when using the highway insurers of the safety of the Postmaster-General's property, though it may not have been unreasonable to impose such an obligation on the special classes of persons referred to.

Sir Patrick Hastings A.-G. and *Harold Murphy* for the respondent were not called upon.

BANKES L.J. This case, which was fought on agreed facts, raises a point of considerable general importance, whether a

member of the public, who when using the highway without negligence on his part injures a telegraph post belonging to the Postmaster-General, is liable under s. 8 of the Telegraph Act, 1878, to pay the expense of making good the injury. It has been strenuously argued that the language of s. 8 ought not to be read in its ordinary sense, and that the word "person" should be understood as applying only to persons who, to use Mr. Matthews' expression, stand in a statutory relation to the Postmaster-General, by which I understood him to mean landowners and public bodies who had special statutory rights as against the Postmaster-General, and as excluding ordinary members of the public. Mr. Matthews' contention was that it was reasonably clear from the language of the Act as a whole, especially when read along with the earlier Act of 1863, that the Legislature intended to use the word "person" in a limited sense, and did not intend to impose this wide liability upon members of the general public. Speaking for myself, I think that the sections in the Act of 1863 to which we have been referred, so far from supporting that contention tend to the opposite conclusion. To my mind the word "person" when used in that Act is used quite generally, and I can see no reason for placing any limitation upon that word when used in ss. 8 and 9 of the Act of 1878. Indeed I think I can see every reason why the Legislature should have intended to include members of the general public within the purview of those sections, because for some time before the passing of the Act of 1878 the great importance of the maintenance of continuous telegraphic communication had come to be recognized, and it was well known that the principal telegraphic lines throughout the country were carried alongside public roads or other public places, where they required protection from the general public, and the statute has in those sections provided the means by which that protection is to be afforded. Take s. 9 for instance, which deals with the penalties for obstruction. In the absence of any language plainly indicating such an intention, why should it be assumed that the Legislature meant to exclude passengers on the highroad from the class

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of possible obstructors ? for an obstruction is just as likely to be caused by them as by the other classes of persons referred to. And the same observation applies to s. 8. In my opinion there is every reason why the word " person " should be read in its ordinary and unrestricted sense. I think that the judgments below were right, and that the appeal should be dismissed.

SCRUTTON L.J. In dealing with this case I wish to make it clear what are the assumed facts on which I base my decision. Unfortunately the parties in making their admissions of fact have not been as precise as they might have been. We are told that we are to deal with the case on the admission that the defendants' servant, acting in the course of his duty, drove a motor lorry along the highway and " brought it into contact " with a fire alarm post and thereby injured the telegraph line. That leaves us in the dark as to what actually happened. But I must assume from what is so stated that the injury was caused by some act of the servant, as to which however there is a counter admission that the act was not negligent. I do not decide what the position would be if the injury had not been directly caused by any act of the servant, as for instance if the defendants' lorry had been forced against the post by another vehicle, or if the machinery of the lorry or the horse drawing it had got out of control. I do not propose to decide that because of the difficulty arising out of a decision on similar facts in a case under the Harbours, Docks and Piers Act, 1847, which by s. 74 provides that : " The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same to the harbour, dock or pier, or the quays or works connected therewith." In that case, *River Wear Commissioners* v. *Adamson* (1), a vessel was in consequence of bad weather abandoned by her crew, and, with nobody on board her, she drifted against a pier and did damage, and the question before the House of Lords was

(1) (1877) 2 App. Cas. 743.

whether any limitation was to be placed on the wide provision that the owner should be liable for the damage done. The different law lords gave different interpretations of what the section meant, but the majority of them were disposed to take the view that it was at least subject to this limitation, that the owner was not to be held liable where the vessel was not under the control of anybody at the time the damage was done. The reason why that conclusion was arrived at seems to have been mainly that which was given by Lord Blackburn (1), adopting what was said by Mellish L.J. in the Court of Appeal (2): "It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour." The section which we have to construe in this case is on much the same lines, and the similar considerations apply to it. [His Lordship read the section:] But it is said on behalf of the defendants that even if the injury was directly caused by an act of the defendants' servant, still the defendants were not liable in the absence of negligence, for they were not "persons" within the meaning of the section. It is said that when the statute imposes an absolute obligation upon "any undertakers, body or person" it is thinking only of a class of persons who have statutory rights which may clash with those of the Postmaster-General and not of the ordinary public, who have no such

(1) 2 App. Cas. 768. (2) (1876) 1 Q. B. D. 546, 554.

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statutory rights, and that it was not intended that the latter should be liable to make compensation for an injury under circumstances under which they would not be liable at common law. The definition of "undertakers" in s. 2 is: "The parties, whether company, commissioners, trustees, corporations, or private persons, empowered by an Act of Parliament to execute an undertaking and any lessee or tenant thereof," so that "undertakers" includes "persons" already. And when you look at the Act of 1863, which is to be read along with the Act of 1878, you find in s. 3 that "Any provision referring to a body applies to a person as the case may require," so that you have got "person" referred to twice, once in the definition of "undertakers" and once in that of "body," yet you find it put in a third time; from which the natural inference is that it was intended to add something to the other words, and to refer to a different class of persons. In my opinion, there is nothing in the Act to lead to the conclusion that the Legislature was using the word "person" in any other than its ordinary natural meaning, or intended to limit it to persons who stood in some statutory relation to the Postmaster-General. As I have said, I do not propose to deal with cases in which the telegraph line is injured not by the defendant, but by his property, which has got loose and come into contact with the line without his direct agency. If it is desired to raise the question of liability under such circumstances it must be upon admissions clearly stating the facts. On the admissions in the present case I limit the defendants' liability to a case in which the owner of the property doing the damage is by himself or his servant in control of the property at the time of the damage, so that he or his servant may be said to have injured the telegraphic line. I agree that the appeal should be dismissed.

ATKIN L.J. I agree. I also wish to reserve the question which has been reserved by Scrutton L.J., and I am glad to be able to do so, for otherwise one would have to try and determine the real ratio decidendi of the decision of the

House of Lords in *River Wear Commissioners* v. *Adamson*. (1) That is a task which has already taxed much greater authorities than I profess to be, and I am glad to be relieved of it. But apart from that I find very little difficulty in the case. I agree that the words " undertakers, body or person " are to some extent tautologous, the word " person " having been already included in both the preceding terms by statutory definition. To my mind the meaning of " person " as used in s. 8 is quite unrestricted. There is no reason for giving the word any other than its ordinary meaning, and the obligation imposed by the statute, wide as it is, seems to me to be one which it is perfectly possible to suppose that Parliament really intended.

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Appeal dismissed.

Solicitor for the appellants: *F. T. Berryman.*

Solicitor for the respondent: *Solicitor to the Post Office.*

J. F. C.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A. 1924 *April* 29; *May* 26.

THE KING *v.* CHARLES LESLIE NORMAN.

Criminal Law—Habitual Criminal—Previous Conviction as habitual Criminal—Admissibility of Evidence as to Character—Province of Jury—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-ss.* 1, 2 (*b*).

Where a person who has been found to be a habitual criminal and has been sentenced to preventive detention subsequently commits another crime and a notice is served upon him under s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908, the jury are not bound to find the prisoner to be at the time when the verdict is given a habitual criminal. In every case it is a question of fact for the jury to say whether or not the prisoner is still a habitual criminal, and the prisoner is entitled, notwithstanding that he has previously been found to be a habitual criminal and sentenced to preventive detention, to call evidence to show that he is not at the material time a habitual criminal.

Rex v. *Stanley* [1920] 2 K. B. 235 overruled.

M'Donald v. *Lord Advocate* 1917 S. C. (J.) 17 not followed.

APPEAL from a conviction and sentence at the Central Criminal Court.

The appellant pleaded guilty to counts in an indictment

(1) 2 App. Cas. 743.

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charging him with burglary, stealing and receiving, and uttering a forged cheque. He was also charged with being a habitual criminal, the ground stated in the statutory notice served upon him under s. 10 of the Prevention of Crime Act, 1908 (1), being that on September 6, 1917, he was found by a jury to be a habitual criminal, and was then sentenced to six years' preventive detention. The notice added that evidence might also be given of a long series of previous convictions against him, which were set out in the notice.

At the trial, upon proof being given that the appellant had already been found to be, and had been sentenced as, a habitual criminal, he was informed by the Court that evidence upon his part was "of no avail," and the jury was directed that it was compelled to find that he then was a habitual criminal. He was found by the jury to be a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

The appellant appealed against the finding that he was a habitual criminal and against the sentence of preventive detention.

The appeal was first heard on December 10, 1923, before Lord Hewart C.J., Sankey and Swift JJ., and was adjourned

(1) The Prevention of Crime Act, 1908, s. 10, sub-s. 1: "Where a person is convicted on indictment of a crime, committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention. . . . ."

Sub-s. 2: "A person shall not be found to be a habitual criminal unless the jury finds on evidence—

"(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

"(*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

in order that it might be heard before a Court of five judges. The case was reargued on December 21, 1923, before Lord Hewart C.J., Avory, Lush, Sankey and Swift JJ. The case was again reargued on April 29, 1924, before a Court of thirteen judges—namely, Lord Hewart C.J., Avory, Horridge, Lush, Rowlatt, Bailhache, Shearman, Sankey, McCardie, Roche, Greer, Swift and Branson JJ.

Roland Oliver for the appellant. It was a misdirection for the judge to direct the jury that it was bound to find the prisoner to be a habitual criminal because he had been found on a previous conviction to be a habitual criminal and sentenced to preventive detention. Under s. 10, sub-s. 1, of the Prevention of Crime Act, 1908, it is for the jury to find whether or not the prisoner is a habitual criminal. Sub-s. 2 of that section provides that: "a person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or (*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention." The words at the commencement of the sub-section have been interpreted in the present case to mean "a person shall be found to be a habitual criminal if" the jury finds that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention. According to that section three conditions precedent have to be fulfilled; the Legislature have said that a person shall not be found to be a habitual criminal unless the jury finds the three conditions to have been fulfilled. Those conditions precedent are safeguards in favour of the prisoner. If the prosecution prove those three conditions a prima facie case has been made out, but it is then open for the prisoner to call evidence in order to show that although he was once a habitual criminal he is not so now, and it is for the jury

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to find whether or not he is at the present time a habitual criminal. The jury is not bound to find that he is a habitual criminal. The statute by saying that a man shall not be found to be a habitual criminal unless certain conditions precedent are fulfilled does not say that he shall be so found if the conditions precedent are fulfilled. The fact that the judge has a discretion whether or not he will pass a sentence of preventive detention is no answer to the contention that it is open to the jury to find whether or not a man is a habitual criminal. A finding that a man is a habitual criminal must prejudice him whether or not a sentence of preventive detention is passed. The fact that a charge of being a habitual criminal is laid against a prisoner under sub-s. 2 (*b*) no more concludes the matter than if the charge is laid under sub-s. 2 (*a*). The authorities with regard to this matter are against the present contention. In *Rex* v. *Davis* (1) the Court of Criminal Appeal held that it was sufficient to prove that the accused person has been previously found to be a habitual criminal and sentenced to preventive detention without also proving that he has been leading persistently a dishonest or criminal life. That case is not really against the present contention, because the question whether or not a prisoner can call evidence to prove that he is not a habitual criminal was not raised. That case followed a previous unreported case of *Rex* v. *Collins*. In *Rex* v. *Stanley* (2), however, the Court held that where a person has been found to be a habitual criminal and has been sentenced to preventive detention, and he subsequently commits another crime, the jury must, under s. 10, sub-s. 2 (*b*), of the Act of 1908, upon proof of the previous conviction as a habitual criminal, find him to be a habitual criminal. The Court said that to hold otherwise would be to reverse the decision in *Davis's Case*. (1) That decision has been followed ever since. The Legislature carefully abstained from giving a definition of what constitutes a habitual criminal.

Travers Humphreys and *Horace Fenton* for the Crown. The question of hardship ought not to be introduced in

(1) [1917] 2 K. B. 855. (2) [1920] 2 K. B. 235.

construing the language of a statute. Safeguards have been introduced into the Act of 1908 which have to be complied with before a man can be charged with being, or be found to be, a habitual criminal. The Director of Public Prosecutions has an absolute discretion as to allowing a charge of being a habitual criminal to be brought, and such a charge is not allowed to be brought merely because a person has been previously found to be a habitual criminal. If however a charge of being a habitual criminal is brought against a person under s. 10, sub-s. 2 (*b*), who has been previously found to be a habitual criminal and sentenced to preventive detention, the jury is bound to find him to be a habitual criminal, but it is within the discretion of the Court to decide whether a sentence of preventive detention ought to be passed. A charge of being a habitual criminal is not the charge of a crime or offence; it is only the allegation of a status or condition in the accused person: *Rex* v. *Hunter* (1); and the jury in finding a man to be a habitual criminal does not convict him of a crime, but merely finds that he has acquired a certain status. The Act provides in sub-s. 2 of s. 10 that before a jury can find a man to be a habitual criminal it must find certain facts—namely, that he has been three times convicted of a crime since attaining the age of sixteen and that he is persistently leading a dishonest or criminal life—but if he has been previously found to be a habitual criminal and sentenced to preventive detention the proof of that fact is sufficient to enable the jury to find the man to be a habitual criminal. Sub-s. 2 of s. 10 is a definition of a habitual criminal. The Act was not passed in the interests of habitual criminals but for the protection of the public against criminals. When it is alleged that a man is a habitual criminal and the notice is given under sub-s. 2 (*b*), the only evidence that can be given before the jury is that the person charged has been previously found to be a habitual criminal and sentenced to preventive detention. The Legislature has in that case taken away the right of the jury to find that the man is not a habitual

(1) [1921] 1 K. B. 555.

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criminal, because it has enacted that a man shall be deemed to be a habitual criminal if he has previously been found to be a habitual criminal and sentenced to preventive detention.

[LUSH J. Is not the effect of a charge under sub-s. 2 (*b*) to shift the onus of proof upon the person charged, whereas on a charge under sub-s. 2 (*a*) the onus is on the prosecution? If a person charged under sub-s. 2 (*b*) gives evidence he may be able to rebut the presumption.]

If the construction that is being placed upon (*b*) is not correct it will be necessary to proceed in every case under (*a*) as well as under (*b*). *Rex* v. *Davis* (1) is not a decision to the effect that "shall not be found unless" means "shall be found if," because it was not necessary for the decision of that case so to hold, but there is a dictum to that effect. *Rex* v. *Stanley* (2) is a decision directly in favour of the Crown. It was pointed out in that case by counsel for the Crown that the question whether or not a prisoner might call evidence to prove that he is not a habitual criminal was not raised in *Rex* v. *Davis*. (1) In *M'Donald* v. *Lord Advocate* (3) the Scottish Court of Criminal Appeal held that the meaning of s. 10, sub-s. 2, was not materially different from what it would have been if the words had been "a person shall be found to be a habitual criminal if (but only if) the jury finds on evidence" (*a*) or (*b*) and that if a prisoner falls within the terms of sub-s. 2 (*b*) the judge must direct the jury to find the prisoner a habitual criminal.

Roland Oliver in reply. The statutory notice given to the prisoner is not given under sub-s. 2 of s. 10, but is a notice of the materials on which it is alleged that he is a habitual criminal.

Cur. adv. vult.

May 26. LORD HEWART C.J. I am requested to say that Horridge, Lush, McCardie, Roche, Greer, Swift and Branson JJ. concur in the judgment which I am about to

(1) [1917] 2 K. B. 855. (2) [1920] 2 K. B. 235.
(3) 1917 S. C. (J.) 17.

read. This appellant pleaded guilty at the Central Criminal Court to counts in an indictment charging him with burglary, stealing and receiving, and uttering a forged cheque. He was also found to be a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention. The statutory notice given by the Director of Public Prosecutions was based primarily, but not exclusively, on the proposition set out in s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908, and it stated that on September 6, 1917, the appellant was found by a jury to be a habitual criminal and was then sentenced to six years' preventive detention. The statutory notice added that evidence might also be given of a long series, set out in the notice, of previous convictions against the appellant. At the trial, upon proof being given that the appellant had already been found to be, and had been sentenced as, a habitual criminal, he was told by the Court that evidence on his part was "of no avail," and the jury was directed that it was compelled to find that he then was a habitual criminal. The appellant appeals against that finding.

It is said on the part of the prosecution that in a case where the notice served on the prisoner contains the statement set out in s. 10, sub-s. 2 (*b*), of the statute, the only question is one of identity—namely, is this prisoner the same person as the one who was previously found to be a habitual criminal and sentenced to preventive detention? If that question is answered affirmatively, it is contended that the jury has no choice in the matter, that its verdict becomes purely automatic, that no other question arises and no other evidence is admissible, and that the jury is bound to find as a fact that the prisoner still is, at the time when the verdict is given, a habitual criminal. This result, it is said, follows from the judgments given in three decided cases. Those cases are *Rex* v. *Collins*, which is not reported; *Rex* v. *Davis* (1); and *Rex* v. *Stanley*. (2) But an examination of those cases seems to show that the proposition is not accurate. In

(1) [1917] 2 K. B. 855. (2) [1920] 2 K. B. 235.

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Rex v. *Davis* (1) the question was not whether in such a case the jury must, but only whether it might, find that the prisoner was still a habitual criminal. It appears from the passage in the report of that case (2), in which the decision in the unreported case of *Rex* v. *Collins* was referred to in argument, that that also was a decision to the same limited effect. In other words, each of those two cases turned upon the question, not whether in such circumstances the jury was bound to decide against the prisoner, but whether, if the jury thought fit in all the circumstances of a particular case, it was sufficient for the prosecution to prove that the prisoner had formerly been found to be a habitual criminal and as such had been sentenced. The difference, and it is a noteworthy difference—and, indeed, the essence of the matter—appears, for the first time, in the decision in *Rex* v. *Stanley*. (3) In that case, undoubtedly, it was argued, and the Court held, that such evidence was not only sufficient, but also unanswerable; or, in other words, that, where the prosecution choose to treat the proposition set out in s. 10, sub-s. 2 (*b*), of the statute as the ground, or one of the grounds, of the charge that the prisoner is a habitual criminal, he has, and can have, no answer apart from the simple question of identity, and the jury, subject only to that question, has no alternative but to return a verdict against him. That decision is entitled to great respect. But two points are to be observed. The first is that in that case the appellant, the prisoner, was not represented, and no argument whatever was addressed to the Court by counsel on his behalf. The second is that the judgment purports to be based upon the judgments in the earlier cases of *Rex* v. *Collins* (4) and *Rex* v. *Davis* (1), and neither contains nor suggests any reason for going beyond what the judgments in those cases laid down. "Can" appears to become "shall," "may" appears to become "must," but for reasons which are not explained. The question here is whether the judgment in *Rex* v. *Stanley* (3) is to be followed. If it is to be followed, the true

(1) [1917] 2 K. B. 855.
(2) [1917] 2 K. B. 856.
(3) [1920] 2 K. B. 235.
(4) Unreported.

proposition, no doubt, is that which has been contended for by the prosecution in the present case—namely, that as soon as it is decided to include in the statutory notice the statement contained in s. 10, sub-s. 2 (*b*), it is made certain beforehand that the jury, subject only to the question of identity, must find against the accused.

It was suggested in argument that the question is really of no importance and has merely an academic interest. But it is not possible to accept that view. The statute which has to be interpreted was enacted, it is true, no more than sixteen years ago. But it is not a statute enacted for a limited period, and fifty years hence, should the argument for the prosecution be sound, although a man may have been living honestly for the next preceding forty years, a jury may, if he then lapses once, be compelled to find that he is still a habitual criminal because he was so found half a century before. It is said that in such a case, although the prisoner is found to be a habitual criminal, it is not necessary that he should be sentenced to a further period of preventive detention. That observation is no doubt true. But it affords no reason for a finding that the prisoner is a habitual criminal unless the clear provisions of the statute are such as to include him. As was said by Wright J. in *London County Council* v. *Aylesbury Dairy Co.* (1): "I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

The question is, therefore, what does the statute mean? Now, it is to be observed that by s. 10, sub-s. 1, the provisions concerning detention of habitual criminals apply only in cases where, after conviction for a crime, "the offender admits that he is or is found by the jury to be a habitual criminal." That is to say, unless the offender makes the admission, it is in each case a question, not of law for the judge, but of fact for the jury, whether the offender is or is not a habitual criminal.

(1) [1898] 1 Q. B. 106, 109.

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Then sub-s. 2 of s. 10 enacts that "a person shall not be found to be a habitual criminal unless the jury finds on evidence" one or other of two things (*a*) or (*b*). Here, again, the statute seems deliberately to make it plain that the question is one of fact for the jury, to be determined by the jury on evidence. Sub-s. 1 has already enacted that, in the absence of an admission on the part of the offender, it is for the jury to find whether he is a habitual criminal. It follows that when sub-s. 2 provides that "a person shall not be found to be a habitual criminal unless" one must read in the words "by the jury" after the word "found," so that the opening words of sub-s. 2, when they are written out in full, read in this way: "a person shall not be found by the jury to be a habitual criminal unless the jury find on evidence" (*a*) or (*b*). The question for the jury seems always to be the general question, Is this offender a habitual criminal? and the jury must not answer that question in a sense adverse to the offender unless, at least, it is satisfied of the truth of one or other of the two propositions (*a*) or (*b*). In other words, the affirmative answer of the jury to the general question must at the least be founded upon, and involve, an affirmative answer to the particular question. This view of the matter seems to be strengthened by the remaining provisions of the section. It is, for example, provided by sub-s. 3 that in any indictment under the section "it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal"—that is to say, the general proposition—and in sub-s. 4 the question for the jury appears to be expressly defined and set out in these exact words "the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal," that is to say, the general question. Some difficulty appears to have arisen in the course of the present controversy, because it seems in some quarters to have been thought that the two propositions (*a*) and (*b*) set out in sub-s. 2 contain in themselves a complete and exhaustive, though alternative, account of the grounds upon which the charge that the offender is a habitual criminal may be founded.

But in our opinion this view cannot be sustained. The closing words of sub-s. 4 make it reasonably plain that no such limitation is intended. On the contrary, the words are quite general—namely, "the notice to the offender shall specify the previous convictions and the other grounds" [in the plural] "upon which it is intended to found the charge." If these words are read side by side with the propositions (*a*) and (*b*) contained in sub-s. 2, and the issue formulated in sub-s. 4, it is apparent that the notice may contain any grounds upon which the jury may reasonably be asked to come to the general conclusion that the offender is a habitual criminal, but, in order to be effective, those grounds must at least contain sufficient material to enable the jury to be satisfied in particular of the truth of proposition (*a*) or of proposition (*b*). And, indeed, in the present case, although the statutory notice contained proposition (*b*), it went on to mention a series of previous convictions. More than that, by sub-s. 5 of the same section it is expressly provided that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life." In these words there is nothing to say or to suggest that, where the statutory notice is directed primarily or exclusively to proposition (*b*) in sub-s. 2, the accused is debarred from giving or tendering evidence on his own behalf. The words of sub-s. 5 seem clearly to point to the opposite conclusion.

The general question, Is this offender a habitual criminal? is, and must always be, in the absence of admission, a question of fact for the jury to determine. But if it really is a question of fact for the jury, it seems a little remarkable that it should be the duty of the judge—as the argument for the prosecution here contends—to leave the question of fact to the jury by the unusual method of directing the jury to find a verdict against the accused person.

The argument for the prosecution appears manifestly, and

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indeed, admittedly, to involve at least three contentions: (1.) That the words in s. 10, sub-s. 2, "shall not be found . . . . unless" mean "shall be found . . . . if"; (2.) that the words introduced in this way are intended to be alternative definitions of the term "a habitual criminal"; and (3.) that, although the question is made by the statute a question of fact for the jury, nevertheless, if the evidence is such as to establish what is set out either in proposition (*a*) or in proposition (*b*) in s. 10, sub-s. 2, it is the duty of the judge to direct the jury as matter of law to determine the question of fact in a sense adverse to the accused person. There is, in our opinion, no sufficient warrant for these contentions. The words "shall not be found . . . . unless" seem clearly to lay down certain conditions precedent, or safeguards, and are not apt words to express a definition. The use of words of qualification, exception, proviso, or condition to convey by themselves a substantive affirmative proposition is always inaccurate as a form of diction. There are no doubt varying degrees of harshness. Examples are "no one except . . . . is," "never . . . . except when," "is not . . . . unless," and "shall not be found . . . . unless." Perhaps the last form is the harshest, and it is the form to be dealt with in the present case. It would be easier to extract an affirmative out of the words "no one is a habitual criminal unless he is," etc. In our opinion the view that sub-s. 2 contains a definition is contradicted as well by the words themselves as by the scheme and the language of the whole section and its various parts. It may be observed that the supposed definition relates to, and deals only with, the functions of the jury, and leaves untouched and undefined the habitual criminality to which, it is contemplated, a prisoner may plead guilty.

Moreover, it is not seriously contended here that the language of the section considered as a whole is not capable of a construction which avoids the consequences that flow from treating the words referred to as a definition. It is not necessary to dwell upon the presumptions against the view that a statute intends what is unreasonable, unjust, or absurd.

The rule is clear that when the language of a statute admits of more than one construction, and if its construction in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended unless the intention be manifested in express words. And, as was said by Lord Esher M.R. in *In re North* (1): "there is the rule of construction that if a statute, which so affects a man's status as to be in effect a penal enactment, is capable of two constructions, that one should be adopted which is most favourable to the person affected." Or again, in the words of Lord Abinger C.B. in *Henderson* v. *Sherborne* (2): "The principle adopted by Lord Tenterden, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so."

It is said, by way of suggested comparison, that in every case where a prisoner, after being convicted of an offence, is called upon to admit a previous conviction and denies it, the jury has the same function as that which the argument for the Crown would permit to the jury in the present case. But it is tolerably clear that the implied argument is an argument in a circle. In the cases where the sole question is whether the defendant was the person previously convicted, it is obvious, ex hypothesi, that there is no other question. But, in the examination of the difficulty involved in the present case, the crux of the matter is precisely the inquiry whether there is not another and larger question than the question: Was the defendant the person who was previously found to be a habitual criminal? In other words, the controversy here is whether, upon the true construction of the statute, there is not for the jury a question other than the question of mere identity. That controversy is not illuminated by the statement that where the sole question is one of identity no other question arises.

It is further contended that it must be right to direct

(1) [1895] 2 Q. B. 264, 271. (2) (1837) 2 M. & W. 236, 239.

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the jury that it has no choice in the matter where the statutory notice contains proposition (*b*), because (it is argued) it must be right to direct the jury that it has no choice in the matter where the notice contains proposition (*a*) of s. 10, sub-s. 2, and the evidence is such as to establish the proposition. But this argument appears to rest upon no sufficient foundation. The requirements of proposition (*a*) are satisfied in full as soon as it is proved, for example, that the defendant was three times convicted after the specified age and that he is leading persistently a dishonest life. The words are "dishonest *or* criminal" not "dishonest and criminal," and the words are "*is* leading persistently" not "has since the last of such convictions been leading persistently." Yet it might well be that a jury should, and would, decline to find the defendant to be a habitual criminal if he succeeded in establishing, for example, that for many years after the last of the three convictions he had lived an honest life, or that the convictions, or some of them, were for comparatively minor offences, or that they or some of them were separated by such an interval of time as not to point to a habit. Certainly it has not yet been suggested that evidence to that effect would be irrelevant, though in the present case the defendant was informed, and, if the argument for the Crown be correct, was rightly informed, that it would be a mere waste of time for him to offer to the jury evidence relating to his mode of life subsequent to his release from preventive detention. Where the statutory notice is given with special reference to proposition (*a*) in s. 10, sub-s. 2, and the evidence proves the proposition, nevertheless the offender may rightly be found not to be a habitual criminal. To take an illustration: a man of fifty years of age may be found to have been three times convicted of crime between the ages of sixteen and twenty-five years, and the evidence may prove that he is leading persistently a dishonest life by persistently pretending to be in Holy Orders, or to be a qualified medical man. Yet the jury might say, and say properly, that he was not the sort of person the Act was aimed at, and that he ought not, because he had committed some fresh offence,

to be found to be a habitual criminal. It was suggested in argument that the term "habitual criminal" is a term which, taken by itself, is extremely vague and difficult to understand. But under the provisions of this statute the jury has not the task of inquiring whether the offender is a habitual criminal if he himself admits that he is one. It does not seem to be an extravagant view to suppose that, in the judgment of the Legislature, a jury, no less than a prisoner, might be expected, without undue difficulty, to appreciate the difference between a man who commits a crime and a man who is in the habit of committing crime.

Our attention was directed to the decision of the Court in *Rex* v. *Hunter*. (1) That decision, it was said, involved the conclusion that when once a jury has found a prisoner to be a habitual criminal, and he has been sentenced to preventive detention, he thereby acquires, and can never get rid of, the permanent "status" of habitual criminal. But it is apparent that that case was concerned with a very different question—namely, whether the allegation that a man is a habitual criminal is a charge of an offence or crime, or whether it merely asserts "a status or condition in him." The words "status" or "condition" were used in that context merely for the purpose of indicating something antithetical to offence or crime, and no question of permanent status was so much as suggested. The "status" or "condition" referred to was the "status" or "condition" at the particular time only. Reference was also made in argument to a Scottish case, the case of *M'Donald* (2), where it appears to have been thought that the words in s. 10, sub-s. 2, of the Prevention of Crime Act, 1908, contain a definition of the term "habitual criminal." That decision also is entitled to be treated with great respect. But it would seem to be based entirely upon a view that the statute must contain some definition of the term "habitual criminal," and that, in the absence of anything better, the words "shall not . . . . unless" ought to be treated as if they were "shall . . . . if," and amounted to a definition. We are of opinion, however,

(1) [1921] 1 K. B. 555.

(2) 1917 S. C. (J.) 17.

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for the reasons already stated, that the Legislature, as in such a matter is not, perhaps, unnatural, has deliberately refrained from a definition, and has left to the jury the question whether the prisoner is a habitual criminal, taking care, however, to provide that he must not be so found unless, at the least, one or other of two conditions precedent shall have been fulfilled.

It remains to refer to the last argument adduced on the part of the prosecution. It is said that, if the view urged on the part of the appellant is correct, that part of s. 10, sub-s. 2, which contains proposition (*b*) becomes "unworkable," and, indeed, futile. But on examination it seems clear that this argument ought not to succeed. It is based on the erroneous view that s. 10, sub-s. 2 (*a*) and (*b*), purport to state alternatively and to exhaust the grounds of the statutory notice. More than that, where the prosecution have in their possession materials which may establish proposition (*a*) they have no need for proposition (*b*). In other words, they are, ex hypothesi, in a position to prove not only certain previous convictions, but also that the offender is (in the present tense) leading persistently a dishonest or criminal life. Their evidence, that is to say, is such as to cover the period leading up to the indictment. But it may be that in a particular case such evidence is not forthcoming, although the offender has been previously found to be a habitual criminal, and detained as such, and although there is good reason for the suspicion that he has since been, and still is, leading persistently a dishonest or criminal life. In such a case it may well be thought right to serve a notice with special reference to proposition (*b*), and if that course be taken, and if the fact be proved that the offender was previously found to be, and was detained as, a habitual criminal, the condition precedent which enables the jury to come to a conclusion is satisfied. But there is nothing to prevent the offender from offering evidence. It is this compendious fulfilment of a condition precedent, and not something else, which appears to be referred to in the judgment in *Rex* v. *Davis* (1) as giving

(1) [1917] 2 K. B. 855.

rise to possible hardship. In all such cases it is tolerably obvious that much may depend upon the length of the interval elapsing between the date of release from preventive detention and the date of the further charge under the statute. That interval may be weeks, or months, or years, and even many years. In each case it is, in our opinion, a question of fact for the jury to decide whether the charge that the offender is (not was) a habitual criminal is established.

In our opinion, therefore, a direction was in the present case given to the jury which was too unfavourable to the appellant, and he was prevented from giving evidence on his own behalf. But it might, nevertheless, be contended that no substantial miscarriage of justice has actually occurred, and that the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, ought to be applied. That contention would involve the argument that, in view of the undoubted facts relating to the criminal career of the appellant, the jury, upon a proper direction, could not rightly have done otherwise than come to the same conclusion as that to which it came in the actual course the trial took. There is, it is clear, much to be said for that contention. Upon the whole, however, in view of all the circumstances, we do not think it necessary or desirable to apply the proviso to the facts of the present case. In the result, therefore, the appeal is allowed, and the sentence of preventive detention is quashed.

AVORY J. read the following judgment: With profound respect for the judgment just delivered, apart from the question whether this Court has the power, and if it has whether it is expedient, to overrule the express decision in 1920 of the question at issue in this appeal, I think the case of *Rex* v. *Stanley* (1) was rightly decided, and that any hardship which is suggested as arising from that decision should be remedied by the Legislature. In my opinion, s. 10 of the statute of 1908 should be construed in view of the fact that it is not one creating an offence, but one giving power to impose

(1) [1920] 2 K. B. 235.

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a particular punishment upon the class of offenders who are brought within its ambit, as was decided by this Court in *Rex* v. *Hunter* (1), a decision which is not now impugned, and viewed in this light the suggested hardship to a great extent, if not entirely, disappears. Taking the illustration given in the argument of the man who has led an honest life for many years after coming out of preventive detention and who again commits a crime it is in the last degree improbable that any Court would again sentence him to preventive detention, and if it did this Court would in a proper case review the sentence. It is not sufficient under para. (*b*) of s. 10, sub-s. 2, to prove that the accused person has previously been found to be a habitual criminal, but it must also be proved that he was in addition sentenced to preventive detention and has again committed a crime, and the Legislature may well have intended that such a person by falling again into crime has shown himself to be incapable of reform and therefore resumes or retains the character or status that he had acquired.

In my opinion, the true effect of s. 10, sub-s. 2, paras. (*a*) and (*b*), of the statute is to define in the alternative the conditions under which a person becomes a habitual criminal, in other words if the conditions in either (*a*) or (*b*) are satisfied by proof the jury has no option but to find that the accused person is a habitual criminal, as was decided in the Scottish case of *M'Donald* v. *Lord Advocate* (2), a decision in which I entirely concur. It does not follow in either case that the accused person ought to be sent to penal servitude or preventive detention. I think the statute was framed in the negative form "unless, etc.," instead of the affirmative "if, etc.," in order to guard against the jury putting their own interpretation on the expression and finding a person to be a habitual criminal merely because he has been several times convicted, and the fact that the jury, when the proceedings are based solely on para. (*b*), may have only to determine the question of identity, as they have to do when a previous conviction is charged in the indictment and

(1) [1921] 1 K. B. 555. (2) 1917 S. C. (J.) 17.

disputed, and in many other cases, does not appear to me to justify reading into para. (*b*) words or conditions which are not there.

On behalf of the appellant it is suggested that proof of the conditions under para. (*b*) merely establishes a prima facie case against the accused person which it is open to him to rebut, but if so, having regard to the disjunctive "or" between (*a*) and (*b*), why does not proof of the conditions under para. (*a*) merely establish a prima facie case? I cannot suppose that it would be open to the jury to find that the accused person is not a habitual criminal, although they were satisfied that all the conditions in para. (*a*) had been established by the evidence, the word "dishonest" in that paragraph being used, I think, to cover offences against the law which are not necessarily "crimes" within the definition of the statute.

For these reasons I think the appeal should be dismissed.

My brothers Rowlatt, Bailhache and Shearman JJ. agree with me that the appeal should be dismissed.

Appeal allowed.

Sentence of preventive detention quashed. (1)

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) Sankey J. did not deliver a judgment.

R. F. S.

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WILLIAMS *v.* BRITANNIC MERTHYR STEAM COAL COMPANY, LIMITED.

Landlord and Tenant—Increase of Rent—Notice of Increase—Amendment—No Notice to quit—Retention by Landlord of irrecoverable Rent—Tenant's Right to recover—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1, *s.* 14—*Rent Restrictions (Notices of Increase) Act*, 1923 (13 & 14 *Geo.* 5, *c.* 13), *s.* 1—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 6, *s.* 8.

The landlords of a dwelling-house, to which the Rent Restrictions Acts, 1920 and 1923, applied, served notices of increase of rent, which were incorrect in certain particulars and were not accompanied by notice to quit. The county court judge, acting under s. 6 of the Act of 1923, amended the notices, and held that all money already paid thereunder by way of rent might be retained by the landlords. To this the tenant objected that by s. 8, sub-s. 1, of the Act of 1923 no increase of rent payable by reason of such amendment was recoverable by the landlords "in respect of any rental period which ended more than six months before the date of the order," and that he was entitled under the Act of 1920, s. 14, sub-s. 1, to recover from the landlords any excess rent paid prior to that period. He also objected that the county court judge had no power to amend a notice which was invalid owing to the absence of notice to quit:—

Held, that s. 8, sub-s. 1, of the Act of 1923 must be read together with s. 6 of that Act, and that their joint effect was to limit the landlords' right in respect of rent due as the result of the amendment of the notices to rent due for the six months prior to the date of the order of the county court, and that the tenant was therefore entitled under the Act of 1920, s. 14, sub-s. 1, to recover from the landlords any increase in rent paid in respect of a rental period ending before such six months, as being rent irrecoverable by the landlords under s. 1 of the Act of 1920.

Held, also, that the county court judge had power to amend the notices of increase under the Act of 1923, s. 6, although they were not accompanied by notices to quit.

Appeal from Pontypridd County Court.

The plaintiff was the tenant and the defendants, a colliery company, were the landlords of a dwelling-house in Wood Street, Gilfach Goch, in the County of Glamorgan, which came within the scope of the Rent Restrictions Acts, 1920 and 1923. The standard rent of the premises was 7*s.* per week, the landlords paying rates and taxes and doing all repairs, and the tenant was a workman in the employment of the landlords, who deducted the rent each week from his wages. Since January 9, 1920, the landlords had deducted

amounts which the tenant alleged to be in excess of the standard rent. The tenant contended that these amounts were irrecoverable by the landlords, and brought an action in the Pontypridd County Court, claiming (*a*) an account, and (*b*) payment of the amount of the excess of such deductions over the standard rent, having regard to the provisions of the Rent Restrictions Acts, 1920 and 1923. The landlords had served four notices of increase in rent purporting to be in the form provided by the Rent Restrictions Act, 1920. These were dated respectively February 4, 1920, September 29, 1920, July 11, 1921, and August 26, 1922. The notices were all defective in certain respects, and, except in the case of the fourth notice, contained no notice to quit. The county court judge held that the first notice was void and could not be amended. As to the others, he held that the errors and omissions were due to bona fide mistakes on the part of the landlords, and he amended them under the Rent Restrictions Act, 1923, ss. 6 and 8 (1), such amendments to take effect as from the dates of the respective notices. He also declared that sums already paid by way of rent under the notices as amended

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 6, sub-s. 1: "The county court, if satisfied that any error or omission in a notice of intention to increase rent, whether served before or after the passing of this Act, is due to a bona fide mistake on the part of the landlord, shall have power to amend such notice, by correcting any errors and supplying any omissions therein, which, if not corrected or supplied, would render the notice invalid, on such terms and conditions as respects arrears of rent or otherwise as appear to the Court to be just and reasonable, and, if the Court so directs, the notice as so amended shall have effect and be deemed to have had effect as a valid notice."

Sect. 8, sub-s. 1: "No increase of rent which becomes payable by reason of an amendment of a notice of increase made by order of the county court under this Act shall be recoverable in respect of any rental period which ended more than six months before the date of the order."

Sub-s. 2: "Any sum paid by a tenant or mortgagor which, under sub-s. 1 of s. 14 of the principal Act, is recoverable by the tenant or mortgagor shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

Sub-s. 3: "Nothing in this section shall affect the operation of the Rent Restrictions (Notices of Increase) Act, 1923."

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could be retained by the landlords, but that sums not so paid, which would become payable by reason of the amendments, came within the Rent Restrictions Act, 1923, s. 8, sub-s. 1 (1), and were only recoverable by the landlords for a period of six months prior to the date of the order.

The tenant appealed on the grounds (1.) that the county court had no power to amend under the Act of 1923, s. 6, sub-s. 1, no notice to quit having been given; and (2.) that in any case the landlords were not entitled to retain rent received for periods ending more than six months before the date of the order for amendment.

Montgomery K.C. and *A. T. James* for the tenant. By the combined effect of s. 6, sub-s. 1, and s. 8, sub-s. 1, of the Rent Restrictions Act, 1923, the tenant is entitled to recover the increase in rent paid by him under these notices for rental periods ending more than six months before the order of amendment. For this rent was "irrecoverable" by the landlord under s. 1 of the Rent Restrictions Act, 1920, and is therefore recoverable by the tenant under s. 14, sub-s. 1, of that Act. The Act of 1923, s. 8, sub-s. 2, does not apply: it creates a special case in which the tenant can recover rent to which the landlord is not entitled owing to its being due, under the notice as amended, more than six months before the order of the amendment by the county court. The Act of 1923, s. 6, renders an imperfect notice effective for all purposes for the six months immediately before the amendment order and for the future. Secondly, the Rent Restrictions (Notices of Increase) Act, 1923, s. 1, sub-s. 1, deals only with notices of increase of rent which are "in conformity with" s. 3, sub-s. 2, of the Act of 1920. The present notices were not in conformity with that section, owing to the errors in the notices, and they are therefore not within s. 1, sub-s. 1, of the Notices of Increase Act, 1923. The power of amendment in s. 6, sub-s. 1, of the Rent Restrictions Act, 1923, relates only to notices which are not in valid form for some reason other than the absence of notice to quit.

(1) See note (1) ante, p. 335.

Campion K.C. and *R. Gwyn Rees* for the landlords. The action here is for money paid and retained by the landlord, the notices being then invalid. To such a claim the Act of 1923, s. 8, does not apply. That section simply limits the time within which (*a*) the landlord and (*b*) the tenant can recover, and it only affects the procedure in a suit to recover money due by way of rent as a result of the amendment of the notices of the county court. Where the rent has been actually paid by the tenant or deducted by the landlord the Act of 1923 leaves matters as they were as regards rent due before the commencement of the six months' period in s. 8. The increased rent becomes valid as the result of the amendment and there is no excess. The landlords are entitled to retain the whole of the rent as the result of the amendment, and s. 1 and s. 14 of the Act of 1920 do not apply. Sect. 8, sub-s. 2, of the Rent Restrictions Act, 1923, only applies where the tenant has a right to recover: it does not create any new right.

Upon the second point, the amendment as regards the notice to quit is carried out by statute—namely, by the Rent Restrictions (Notices of Increase) Act, 1923. Thus by the amendment under the Rent Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 6, sub-s. 1, the notices of increase became valid in other respects, and by the Notices of Increase Act, 1923 (13 & 14 Geo. 5, c. 13), s. 1, sub-s. 1, they became valid as regards notice to quit.

Montgomery K.C. in reply.

ROWLATT J. In this case the notices of increase of rent served by the landlords were originally invalid on account of several small errors and omissions, and also because, except in the case of one of the notices, no notice to quit was given. The county court judge, in an action by the tenant to recover moneys overpaid, amended the notices, and questions have arisen as to the effect of that amendment. The county court judge held that all moneys paid under the notices, which have now been made good by the amendment, can be retained by the landlord. The point raised by the

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tenant here is that the landlord can only retain payments made in respect of a rental period which ended within six months before the date of the order, because by s. 8, sub-s. 1, of the Rent Restrictions Act, 1923, his rights to recover an increase of rent which becomes payable by reason of the amendment are so limited. By the Act of 1920, s. 1, it is provided that increases of rent above the standard rent are "irrecoverable from the tenant," and s. 14, sub-s. 1, gives the right to a tenant to recover sums paid on account of rent which are irrecoverable by the landlord by virtue of the Act. The amount which the tenant can recover therefore depends upon its being irrecoverable by the landlord. In the present case, as has been said, the notices of increase of rent were invalid in their original form for the reasons already given. By the Rent Restrictions Act, 1923, s. 6, power is given to the county court to amend such notices, and the amendment made the notices valid. If s. 6 stood alone it would have made the notices good to all intents and purposes, so that the full rent could have been recovered by the landlord and nothing could have been recovered back by the tenant. But s. 8, sub-s. 1, limits the effect of the amendment under s. 6, by providing that no increase of rent payable by reason of the amendment shall be recoverable in respect of "any rental period which ended more than six months before the date of the order." Therefore, it remains in the terms of the statute "irrecoverable" by the landlord and falls within the words of s. 1 and s. 14 of the Act of 1920, which is the principal Act, so that, if paid, it can be recovered from the landlord by the tenant. Sect. 8, sub-s. 2, of the Rent Restrictions Act, 1923, does not affect this case, because that introduces a different limitation in regard to the right of the tenant to recover, which does not arise here. That sub-section says: "Any sum paid by a tenant or mortgagor which, under subsection (1.) of section fourteen of the principal Act is recoverable by the tenant or mortgagor shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the

passing of this Act but not afterwards." That does not affect this case except so far as it shows that recoverability by the tenant is still to be by reference to the legislation contained in s. 14, sub-s. 1, of the principal Act. Now, the argument for the tenant, and the view which was adopted by the county court judge, is that money rightly paid, though only by virtue of an amendment to a notice made ex post facto, was not a thing to be discussed under the term "recoverability" at all, because it had passed into payment. I think that is a very narrow reading of the Act. Sect. 8, sub-s. 1, of the Act of 1923 speaks of "rent payable," and says: "No increase of rent which becomes payable by reason of an amendment of a notice of increase made by order of the county court under this Act shall be recoverable in respect of any rental period which ended more than six months before the date of the order." I think that puts the tenant right upon this point.

Secondly, it is argued on behalf of the tenant that he is able to recover all rent paid up to the present date, because the powers of amendment do not go to the point of enabling the county court judge to amend a notice of increase which is bad for want of a notice to quit. It is said that a notice to quit is not part of the increase of rent notice in this case, although it might have been contained in the same document. Having regard to the history of this legislation, I think that is much too narrow a view for us to adopt. The Rent Restrictions (Notices of Increase) Act, 1923, was designed to avoid a pitfall which had been discovered in the Act of 1920—namely, that a notice of increase was invalid, because no notice to quit had been given, which, as I have said, might be part of the same document. Then the Rent Restrictions Act, 1923, was passed, and provided (s. 6) that any error or omission due to a bona fide mistake could be rectified by the county court. I think that must be held to extend to the error or omission of not incorporating the notice to quit with the notice of increase. Therefore, on the second point, I think that the appeal fails. The tenant is entitled to succeed on the first point, but he fails on the second.

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BRANSON J. I agree, and in view of the complication of this legislation, think it right to express my judgment in my own words.

Two points have been taken by counsel for the tenant in this appeal. It is said, on the first point, that the effect of the exercising by the county court judge of the powers of amendment given to him under s. 6, sub-s. 1, of the Rent Restrictions Act, 1923, do not extend to his making the amendment date back to the original date of the notice, but that the powers of s. 6, sub-s. 1, must be read with the limitation imposed by s. 8, sub-s. 1, of the statute. The effect of it, according to the tenant's contention, is that although the notices originally served in this case which were invalid have now been made valid, they have only been made valid subject to the limitation contained in s. 8, sub-s. 1, and, therefore, that the amounts which the landlord is entitled to retain are the amounts which he has been paid in respect of a rental period which ended within six months of the date of the order. It is clear upon the facts that there were other sums which were paid by the tenant in this case which, at the time that they were paid, came within the meaning of the Act of 1920, and were sums " irrecoverable " by the landlord. The notices which had been given were not in conformity with sub-s. 2 of s. 3 of the Act of 1920; and as the increases were therefore not permitted increases, the sums which the tenant paid in response to demands made in pursuance of those notices were sums which were not recoverable from him, and were sums which by sub-s. 1 of s. 14 of the Act of 1920 the tenant could recover. That was the position when the Act of 1923 was passed; for immediately before the Act of 1923 was passed the sums which the tenant is seeking to recover in these proceedings were sums which he could have recovered, because they were sums which were irrecoverable from him by his landlord. The effect of this Act of 1923 must be gathered, in my view, from the whole Act and not by applying one section and then another. One cannot first apply s. 6, sub-s. 1, and then say that there is a new state of affairs upon which

s. 8, sub-s. 1, is to operate. I think that s. 6 and s. 8 must be read together. The effect of that is to limit the power of the county court judge of making sums which were previously irrecoverable recoverable by the landlord to the period named in sub-s. 1 of s. 8. The result is that sums paid in respect of previous periods were irrecoverable when paid and remained irrecoverable by the landlord within the meaning of this sub-section, and, therefore, by virtue of s. 14, sub-s. 1, of the Act of 1920 may be recovered by the tenant from the landlord.

The second point taken by counsel for the tenant is that in two of the notices of increase given in this case there was no notice to terminate the tenancy. It is said that s. 1 of the Rent Restrictions (Notices of Increase) Act, 1923, applies only to a notice given in conformity with sub-s. 2 of s. 3 of the Act of 1920, and that the powers of amendment which are given in the later Act of 1923, though they may be used to validate a notice which was invalid, do not make it a notice in conformity with s. 3, sub-s. 2, of the Rent Restrictions Act, 1920, and therefore do not make it a notice to which the Rent Restrictions (Notices of Increase) Act, 1923, can apply. That, however, seems to me to be giving too narrow an effect to the powers of the Rent Restrictions Act, 1923, s. 6. The tenant is wrong upon this, but upon the first point the appeal succeeds.

Appeal allowed.

Solicitors for tenant : *Billing & Co., for Jones Pugh & Davey, Pontypridd.*

Solicitors for landlords : *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

F. P. F.

1924
June 4.

ABRAHART *v.* WEBSTER.

Landlord and Tenant—Increase of Rent—Dwelling-house—Reconstruction by Conversion into separate Flats or Tenements—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 9.

A dwelling-house which was within the Rent Restrictions Act, 1920, consisted of a basement and three upper floors. In 1921 the basement was let to a tenant at 11*s.* 9*d.* per week, and in 1923 the landlord without touching the basement converted the upper floors into two separate and self-contained flats. In 1924 the tenant of the basement obtained an order from the county court apportioning the standard rent for his portion of the premises at one-fifth of 60*l.*, which was the rent for the whole house as at August 3, 1914:—

Held, that there had been a bona fide reconstruction of the house as a whole by way of conversion into two or more self-contained flats within the Rent Restrictions Act, 1920, s. 12, sub-s. 9, and that the Act no longer applied to it.

The word "dwelling-house" in s. 12, sub-s. 9, of the Act is used in the ordinary sense, and refers to the whole structure considered as a unit.

Appeal from Brighton County Court.

The appellant was the landlord of a dwelling-house, No. 3, Goldstone Villas, Hove, to which the Rent Restrictions Act, 1920, applied. The house consisted of basement, ground floor, and two upper floors, the standard rent as on August 3, 1914, being 60*l.* per annum. The respondent (here called "the tenant") had occupied the basement as a separate tenement since February, 1921, at a rent of 11*s.* 9*d.* per week. The landlord purchased the property in January, 1921, and in 1923 made alterations to the house, which resulted in the ground floor and upper floors being converted into two separate and self-contained flats. According to the finding of the county court judge the basement tenement derived no benefit from these alterations directly or indirectly, and the tenant continued in occupation thereof as before. In January, 1924, an apportionment was made by the registrar of the Brighton County Court at the instance of the tenant, the standard rent being fixed at one-fifth of 60*l.* for his portion of the premises. From this decision the landlord appealed to the county court judge,

who affirmed the registrar's decision. The county court judge found as a fact that the newly constructed flats could not be identified with the house as it was before the alterations, and that to this extent the house had lost its identity. He distinguished *Stockham* v. *Easton* (1) on the ground that here the tenancy of the basement began before any alterations were commenced, and that that tenement received no benefit from the alterations. He found that the ground floor and upper floors constituted a distinct dwelling-house, which had been converted into two flats, the basement tenement forming no part thereof and remaining as it was in 1914. He held therefore that the tenant was entitled to have the standard rent of his tenement ascertained by apportionment, and affirmed the decision of the registrar.

From this decision the landlord appealed.

Bertram Long for the landlord. The Rent Restrictions Act, 1920, s. 12, sub-s. 9, applies (2), the house having been since 1919 "bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements." Unless the word "dwelling-house" in that sub-section refers to the whole of the house within the four walls, the sub-section is unintelligible. If part of a house were included in the phrase "dwelling-house," the words "part of a house" or "rooms in a dwelling-house" would have been used, as in s. 12, sub-s. 2, and sub-s. 8.

(1) [1924] 1 K. B. 52.

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 9: "This Act shall not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate or self-contained flats or tenements; but, for the purpose of any enactment relating to rating, the gross estimated rental or gross value of any such house to which this Act would have applied if it had been erected or so reconstructed before August 3, 1914, and let at that date, shall not exceed:—

"(*a*) if the house forms part of a housing scheme . . . . the rent (exclusive of rates) charged by the local authority in respect of that house; and

(*b*) in any other case the rent (exclusive of rates) which would have been charged by the local authority in respect of a similar house forming part of such a scheme as aforesaid.

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[BRANSON J. referred also to the use of the word "house" in s. 12, sub-s. 9 (*a*) and (*b*).]

No case is directly in point, but in *Darrall* v. *Whitaker* (1) and *Stockham* v. *Easton* (2) applications for apportionment were refused, because in each case, although some parts of the dwelling-house were unaltered, its identity had been lost owing to alterations.

Raymond Jennings for the tenant. Here the tenancy began before the alterations were commenced, and nothing that the landlord afterwards did could affect the vested right of the tenant to an apportionment under the Act. The tenant's rights were crystallized at the date of the tenancy agreement and the landlord cannot derogate from his grant in this way.

The whole house has not lost its identity. In *Phillips* v. *Barnett* (3) Lush J. points out that a trifling alteration of a house would not be destructive of its identity: and in *Stockham* v. *Easton* (4) the same judge says: "The proper view to take in a case of this kind is to have regard to the house as a whole, and if it be found that the structural alterations to the whole house have been such as to cause it as such to lose its identity, and directly or indirectly to affect the separate floors or rooms in it, then to treat these floors or rooms as having themselves been altered in a substantial manner, and as being no longer the same as they were in 1914." Here the basement tenement is the same as in 1914, and has in no way lost its identity.

Sect. 12, sub-s. 9, of the Act of 1920 must refer to a reconstruction affecting the whole house, and not a part of it. Unless the whole of it is affected there is no reconstruction. Here, as is found in fact, the basement was unaffected and the tenant is therefore entitled to apportionment.

Bertram Long in reply. *Stockham* v. *Easton* (2) was decided apart from s. 12, sub-s. 9, of the Act of 1920, which refers to the present case.

ROWLATT J. This case raises a point which is not covered by authority and upon which authority gives little assistance.

(1) [1923] W. N. 165.
(2) [1924] 1 K. B. 52.
(3) [1921] 2 K. B. 799, 806.
(4) [1924] 1 K. B. 52, 62.

This dwelling-house was let as a whole on August 3, 1914, and at the time of the passing of the Rent Restrictions Act, 1920, was within its scope. In March, 1921, the present respondent became tenant of the basement at a rent of 11*s.* 9*d.* per week. In 1923 the upper part of the house, which was then unlet, was converted into flats. It was not necessary to alter the basement, and indeed that could not have been done unless the landlord had previously obtained the tenant's consent or had got possession of the basement. The tenant has now obtained an order for apportionment under the Rent Restriction Acts, 1920 and 1923, and to this the landlord objects that the house as a whole had been reconstructed by way of conversion into separate and self-contained flats or tenements, and that this takes it out of the operation of these Acts. I am of opinion that there was such a reconstruction of the house as a whole, and that if the basement had been unoccupied, s. 12, sub-s. 9, of the Act of 1920 would without doubt have applied. But it is said that because the tenant was in occupation at the time of its reconstruction he had a right to apportionment under the statute, and that this could not be taken away from him by the action of the landlord in altering the premises. It is argued that the rest of the house apart from the basement constitutes a "dwelling-house" under the Act of 1920, s. 12, sub-s. 9, that being the only part of the premises which the landlord was entitled to reconstruct. If the tenant had asked for apportionment before reconstruction, then his rights, I think, could not have been taken away. But that is not the case here, and the difficulty is that if the tenant now obtains the order for apportionment, he brings the basement within the Act, and so confers privileges for ever upon himself and future tenants, so that the landlord can no longer deal with the house as if a reconstruction had taken place. I think that s. 12, sub-s. 9, must be read in a straightforward way and that the term "dwelling-house" must there mean the whole house, which would in ordinary experience be the subject of conversion into flats. This appeal therefore succeeds.

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BRANSON J. I agree. The findings of fact are here important: First, that the house includes two separate and self-contained flats, and secondly, that there has been a bona fide reconstruction of the house by way of conversion. Thus we know that the house has been reconstructed by way of conversion into two or more separate and self-contained flats or tenements. The question is whether the fact that the basement was untouched by the reconstruction should lead us to regard it as a separate dwelling-house not within s. 12, sub-s. 9, of the Act, or whether that sub-section is to be applied as it stands. I think that the latter is the true view upon the facts here found. It is not necessary, as in *Stockham* v. *Easton* (1), to see whether a new and separate dwelling-house has been constructed; for in that case the Court had to proceed upon facts which did not bring it within s. 12, sub-s. 9, and therefore different considerations applied. It is said by counsel for the tenant here that "dwelling-house" in s. 12, sub-s. 9, must mean the fictional dwelling-house described in the statute, that is to say part of a dwelling-house which is the subject of a separate letting, and that this house in reality consisted of two dwelling-houses, the basement and the rest of the house. The answer to him is that s. 12, sub-s. 9, goes on to deal with the gross rental or value of a house for rating purposes, and it is plain that in that connection the word "house" must refer to the whole structure, by reason of the two clauses (*a*) and (*b*) which follow. The word "dwelling-house" therefore in that sub-section must, I think, be used in its ordinary sense and must refer to the whole structure as a unit.

Appeal allowed.

Solicitors for the landlord: *Cox & Cardale, for Howard Gates & Ridge, Hove.*

Solicitors for the tenant: *Graham-Hooper & Betteridge, Brighton.*

(1) [1924] 1 K. B. 52.

F. P. F.

RICKETTS *v.* COLQUHOUN (Inspector of Taxes).

1924
June 30.

Revenue—Income Tax—Deduction—Office or Employment of Profit—Office of Recorder—Travelling and Hotel Expenses—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

Income Tax Act, 1918, Sch. E, r. 9: "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment . . . . or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

A barrister who is appointed to the office of Recorder of a borough, but who lives and carries on his profession in London, is not entitled to deduct from the emoluments of his office the cost of travelling from London to the borough of which he is Recorder for the purpose of holding his court and back again, nor his hotel expenses while there.

Case stated by the General Commissioners of Income Tax.

At a meeting of the Commissioners held on December 18, 1923, Mr. G. W. Ricketts, barrister-at-law (hereinafter called "the appellant"), appealed against an assessment to income tax made upon him for the year 1923–1924 under Sch. E of the Income Tax Act, 1918, in respect of his office as Recorder of Portsmouth, the amount of the assessment being 250*l.*

The appellant, in giving evidence before the Commissioners, stated that he had been appointed to and held his office as Recorder under the provisions of the Municipal Corporations Act, 1882; that he was a practising member of the Bar residing in London, and carrying on his profession at chambers in the Temple; that he was required under the provisions of the Act of 1882 to hold once in every quarter of a year a court of quarter sessions in and for the said borough; that it was necessary for him to travel to Portsmouth four times in every year in order to hold his court there, and he claimed to be entitled to deduct from the assessment upon him of 250*l.* the following sums on account of expenses incurred or to be incurred by him in the year of assessment:—

		£	*s.*	*d.*
(*a*)	In respect of travelling expenses from London to Portsmouth and from Portsmouth to London	8	5	0

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	£	s.	d.
(*b*) In respect of hotel expenses at Portsmouth	5	0	0
(*c*) In respect of expenses incurred in consequence of wear and tear to his gown and court suit when sitting as Recorder ..	0	10	0
(*d*) In respect of the price of stamps and stationery used by the appellant as Recorder	0	3	0
(*e*) The sum of 10*s.*, being the amount of four payments of 2*s.* 6*d.* each made by the appellant in Portsmouth for the carriage of his tin box to the court	0	10	0

It was not disputed by the Crown that the sums so claimed by the appellant were reasonable in amount if he was entitled to deduct the same in arriving at the sum in which he should be assessed in respect of his office.

The appellant contended that the amounts claimed by him as deductions were all of them expenses which ought to be deducted under and in accordance with the Rules applicable to Sch. E, and he contended that they fell within and were authorized by r. 9 of those Rules.

On behalf of the inspector it was contended that none of the deductions claimed by the appellant were legally permissible, and that they did not fall within r. 9 of Sch. E. Reliance was placed upon *Cook* v. *Knott* (1) and *Revell* v. *Directors of Elworthy Bros. & Co.* (2) as showing that the deductions claimed were not permissible. Reference was also made to s. 209 of the Income Tax Act, 1918.

The Commissioners were of opinion and decided that the appellant was not entitled to any deduction in respect of the sums of 8*l.* 5*s.* and 5*l.* or of either of them. In their view the cases of *Cook* v. *Knott* (1) and *Revell* v. *Directors of Elworthy Bros. & Co.* (2) were in point, and they ought to follow them. Apart from those decisions, the Commissioners were of opinion that these items were not expenses which the appellant was necessarily obliged to incur in the performance of the duties of his office of Recorder, and were not

(1) (1887) 2 Tax Cas. 246. (2) (1890) 3 Tax Cas. 12.

moneys expended wholly, exclusively and necessarily in the performance of those duties.

As regards the item of 10*s.* claimed by the appellant in respect of the carriage of his tin box the Commissioners were not satisfied on the evidence before them that it was necessary for the appellant to expend this sum or any of it, and they disallowed the deduction of this item or of any part of it.

As regards the remaining items claimed by the appellant of 10*s.* and 3*s.* the Commissioners decided that the appellant was entitled to deduct the same from the amount of the assessment.

Sir John Simon K.C., *Konstam K.C.* and *W. Allen* for the appellant. The decision of the Commissioners in refusing to allow a deduction for travelling expenses, etc., from the appellant's assessment to income tax in respect of his office as Recorder of Portsmouth was wrong. A Recorder must by statute be a barrister of five years' standing, usually he is a practising barrister, although that requirement is not compulsory. In most cases a barrister carries on his profession in London. It would be unreasonable to expect a Recorder to live in the borough of which he is Recorder. A Recorder in travelling from London to the borough of which he is Recorder is incurring expenses in the performance of his office within r. 9 of Sch. E of the Income Tax Act, 1918, and is entitled to a deduction therefor from the emoluments of his office. The office of Recorder is not enjoyed merely when the Recorder is holding his court ; it is a permanent office ; he is discharging the duties of his office while on his way to hold his court and not merely while sitting in his court. The Recorder of a borough takes precedence in the borough next to the mayor. The office of Recorder is a statutory office held under the Crown and a Recorder is bound to hold his courts four times a year. There is a clear distinction between the present case and *Cook* v. *Knott.* (1) The Court in *Revell* v. *Directors of Elworthy Bros. & Co.* (2) merely purported to follow the decision in

(1) 2 Tax Cas. 246. (2) 3 Tax Cas. 12.

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the earlier case. Members of Parliament are allowed a deduction from their salary in respect of travelling expenses.

[*Sir Patrick Hastings A.-G.* The reason why a Member of Parliament is allowed a deduction in respect of travelling expenses is because he is supposed by virtue of his office to have a duty to perform both at Westminster and also in his constituency; he is not allowed travelling expenses from his place of residence but only to and from his constituency.]

Sir Patrick Hastings A.-G. and *R. P. Hills* for the respondent were not called upon.

ROWLATT J. I do not think I need trouble you, Mr. Attorney. This case raises a question of hardship. I may go further and say that the position taken up by the Crown is unreasonable, because the expenses which are not allowed to be deducted sometimes more than eat up the emoluments. Nevertheless I think upon the authorities I must decide for the Crown. It has been settled by the two cases which have been cited, *Cook* v. *Knott* (1) and *Revell* v. *Directors of Elworthy Bros.* (2), that a man cannot charge the expense of travelling from his place of residence, which is in his own choice, to the place where he exercises his office, for reasons which I need not repeat; but it is said that this is not on the same footing. It is true that a Recorder must by statute be a barrister of five years' standing, and that in practice means, in nine cases out of ten, that he has to travel from London to perform his duties, though it need not be so. The statute, however, does not say that a Recorder must be a practising barrister; still less does it say that he must be a barrister practising in London. In my opinion, the place where he practises is, in point of law, as much as the place where he resides, at his own discretion to select. In these circumstances it seems to me that I can only arrive at one conclusion—namely, in favour of the Crown. The matter has been complicated by introducing the case of Members of Parliament, who are allowed their travelling expenses as a deduction, but then that deduction is put upon

(1) 2 Tax Cas. 246. (2) 3 Tax Cas. 12.

the footing—whether it is right or wrong it is not for me to say —that they have an office the duties of which are exercisable in two places, and involve in the performance of those duties passing from one place to the other, which makes all the difference, if that explanation is sound.

The only answer I can give to this case is that the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Clowes, Hickley & Heaver.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

R. F. S.

INLAND REVENUE COMMISSIONERS *v.* BLACKWELL.

1924
July 7.

Revenue—Income Tax—Super Tax—Bequest of Real Estate to Trustees for eldest Son upon attaining Twenty-one—Power to apply Income for Maintenance—Direction to accumulate surplus Income—Liability to Super Tax in respect of Accumulations—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

A testator by his will gave certain real estate to trustees upon trust for the eldest of his sons who should be living at the time of his death absolutely upon his attaining the age of twenty-one years, and failing such son he directed the same to fall into and be held upon the same trusts as were declared concerning his residuary estate. He gave the residue of his property, both real and personal, to his trustees, subject to certain payments to his wife, upon trust for all his children in equal shares which were to be an interest absolutely vested on his death. He empowered the trustees to apply the whole or such part as they thought fit of the income of the property or share to which any infant should be entitled or contingently entitled towards his or her maintenance, education or benefit, and he directed the trustees to accumulate the unapplied surplus income, such accumulation to be added as capital to the property or share whence the same should have arisen. The testator at his death left four children, all of whom were infants. The trustees made certain payments to the testator's widow in accordance with the terms of the will and accumulated the surplus income. An assessment to super tax was made upon one of the trustees in respect of the accumulated income arising from the estate specifically bequeathed in trust for the eldest son and from the one-fourth share of the residuary estate to which the eldest son was entitled:—

Held, that inasmuch as there was a trust in the testator's will to accumulate the income subject to a power to the trustees to apply such sums as they thought proper for the maintenance of the testator's

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children, the portion of the income which was accumulated was not the income of the infant eldest son, such accumulations coming to him not as income but as capital, and were therefore not liable to assessment to super tax.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners held on February 26, 1923, for the purpose of hearing appeals, F. S. Blackwell (hereinafter called "the respondent") as trustee for Thomas A. W. Blackwell, a minor, appealed against an assessment to super tax in the sum of 4000*l.* for the year ending April 5, 1919, made upon him under the provisions of the Income Tax Acts.

2. By his will dated December 13, 1919, Walter Reginald Blackwell (hereinafter called "the testator") appointed the respondent, F. S. Blackwell, Reginald St. Aubyn Roumieu and Thomas Geoffrey Blackwell to be the executors and trustees of his will for all the purposes therein expressed and also for the purposes of the Settled Land Acts, 1882 to 1890. He also appointed the same three gentlemen in conjunction with his wife guardians of his infant children.

3. By his will the testator provided (inter alia) as follows: "I GIVE to my said trustees my estate near Watford in the County of Hertford known as Oxhey Place and all land at the time of my death held therewith together with all messuages and erections standing and being thereon UPON TRUST to allow my said wife so long as she remains my widow to use and occupy the house garden and the walled garden private stables motor shed and houses containing electric light plant and cowhouse adjoining and such land as she may require not exceeding twenty-five acres or if she should not desire to live there then to let the same and to receive the income thereof and to hold the same in all respects for her benefit during her life if she shall so long continue my widow and to let the farm and the remainder of my Oxhey land in accordance with the provisions for that purpose hereinafter contained, and subject to my wife's interest in my said house and grounds I DIRECT my trustees to hold

my said Oxhey Estate and the land at the time of my death held therewith or otherwise situate in or near Watford aforesaid including after the death or remarriage of my said wife my said house and grounds and the land surrounding the same and also my property in the village or parish of Bushey and my interest in No. 21, Soho Square, London, UPON TRUST for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of 21 years and failing such son then I DIRECT the same to fall into and be held upon the same trusts as are hereinafter declared concerning my residuary estate."

4. As to all the rest and residue of his property both real and personal, the testator by his said will provided as follows: "I GIVE DEVISE AND BEQUEATH the same to my said trustees UPON TRUST that my said trustees shall sell call in collect and convert into money such real and personal estate at such time or times and in such manner as they shall think fit . . . . and shall out of the monies to arise from such sale calling in and conversion pay my funeral and testamentary expenses debts and legacies and make provision for any duties payable upon my death including duty on legacies given free of duty and duties on my freeholds bequeathed by this my will And to invest the balance of such monies in their or his names or name . . . . And my trustees shall pay out of the income arising from such investments (and from such other investments as shall remain unsold for the time being as from the date of my death) an annual sum of two thousand five hundred pounds to my said wife during her life if she shall so long continue my widow but if I shall leave children born of my said wife and surviving me then the said annual sum of two thousand five hundred pounds shall be increased by a sum equal to five hundred pounds per annum for each such child such increase being payable until such child or children shall attain the age of twenty-one years or shall marry under that age and so that as each of such children shall attain the age of twenty-one or marry as aforesaid the sum of five hundred pounds shall cease to be payable. AND if my said wife shall marry again

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then UPON TRUST to pay to my said wife during the remainder of her life for her separate use without power of anticipation in lieu of the said annual sum of two thousand five hundred pounds the annual sum of one thousand pounds but with the addition thereto of the said annual contingent sums of five hundred pounds as aforesaid. AND AS TO as well the capital as the annual income of the securities or investments constituting my residuary estate my trustees for the time being shall stand possessed thereof subject nevertheless and without prejudice to my wife's prior interest in the income thereof or any part of the income thereof as the case may be UPON TRUST for my child if only one wholly or for all my children (including my said eldest son) if more than one in equal shares and to be an interest or interests absolutely vested on my death but if any of my children shall die in my lifetime leaving issue any of whom shall be living at my death such issue living at my death shall take equally amongst them if more than one the share which their respective parents should have taken if living at my death AND if I shall have no children or grandchildren living at my death then IN TRUST for my said brothers Thomas Geoffrey Blackwell and Aubrey Francis Blackwell in equal shares the children of either who may predecease me taking their deceased parents share and the surviving brother taking his deceased brother's share if such deceased brother shall die without leaving issue who take under this bequest but if both my said brothers shall predecease me without leaving issue them surviving then UPON TRUST for my half-sisters in equal shares the children of any half-sister who may predecease me taking their deceased parents share and such half sisters as shall survive me taking the share of any deceased half-sister who shall die without leaving issue her surviving taking under this bequest. AND I EMPOWER my trustees or trustee for the time being notwithstanding the trusts hereinbefore declared of my said trust fund but so far as the exercise of this power shall affect the income of my said wife only with her consent in writing which she is hereby authorised to give

notwithstanding any restraint on anticipation subject nevertheless and without prejudice to all prior interests which might otherwise be affected by the exercise of this power to apply any part or parts not exceeding in the whole one-half part of the capital of the share to which each or any child of mine shall be entitled or contingently entitled under this my will or any codicil hereto in or towards the advancement in life or establishment in business or otherwise for the benefit of the same child whether such child shall be male or female or shall be under the age of twenty-one years or not. And for the purposes aforesaid to pay the money so to be raised to the guardian or guardians for the time being of such child if an infant But in the event of any such advance being made under this power the child taking such advance shall not be entitled to participate in the rest of my estate without bringing such advance into hotchpot and accounting for the same accordingly AND I ALSO EMPOWER my trustees or trustee for the time being but so far as the exercise of this power will affect the income of my said wife only with her consent in writing subject nevertheless and without prejudice to all prior interests which might otherwise be affected by the exercise of this power to apply the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto in or towards his or her maintenance and education or otherwise for his or her benefit AND I DIRECT my trustees or trustee for the time being to accumulate by investments pursuant to the trust for investment hereinbefore contained the unapplied surplus if any of such income AND I DECLARE that the accumulations thereof shall be liable to be in like manner applied but subject to such liability shall be added as capital to the property or share whence the same shall have arisen."

5. The testator died on October 10, 1912, leaving surviving him his wife, one son, Thomas A. W. Blackwell (hereinafter called "the minor") and three daughters—namely, Barbara, Nancy and Ursula Blackwell. All the four children of the testators were minors.

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6. The widow of the testator remarried on April 18, 1917, whereupon her interest under the will in the estate near Watford known as Oxhey Place and the land surrounding the same ceased.

7. During the year ending April 5, 1918, (*a*) the income arising from the estate near Watford known as Oxhey Place, property at Bushey and No. 21 Soho Square, referred to in paras. 3 and 8 hereof, and (*b*) the surplus income arising from the residuary estate of the testator, referred to in paras. 4 and 8 hereof, after payment to his widow of the sums hereinafter mentioned had been accumulated by the trustees by investment in accordance with the terms of the will. The sums paid to the widow out of the income arising from the residuary estate during the said year were as follows :—

(1.) 1000*l.* (being the annual sum payable to the testator's widow after her remarriage).

(2.) 500*l.* in respect of each of the said infant children of the testator.

(3.) 2031*l.* 5*s.* under the maintenance clause of the will (of which 507*l.* 16*s.* 3*d.* was in respect of the minor).

8. The assessment under appeal had been made upon the respondent in an estimated amount of 4000*l.* under s. 72, sub-ss. 2 and 5, of the Finance (1909–10) Act, 1910, in respect of the income arising from the said estate near Watford, property at Bushey, and No. 21 Soho Square, London, and the income arising from one-fourth share of the residuary estate of the testator, being the share to which the minor was entitled under the said will of December 13, 1909.

9. It was contended on behalf of the respondent that :—

(*a*) The liability (if any) to super tax was on the minor himself as an " individual " under s. 66 of the Finance (1909–10) Act, 1910, and only existed in respect of the income actually " receivable " by him.

(*b*) No income was receivable by the minor in respect of the said estate near Watford, property at Bushey, and No. 21 Soho Square, or in respect of his one-fourth share of the residuary estate of the testator during the year ending April 5, 1918.

(*c*) The respondent as trustee for the minor was only liable for super tax to the extent to which the minor was himself liable. Alternatively:

(*d*) The respondent was not a person who had "failed to make a return under this section" within the meaning of s. 72, sub-s. 5, of the Finance (1909–10) Act, 1910, and it was therefore not competent for the Special Commissioners to make an estimated assessment upon him.

(*e*) The assessment should be discharged.

10. It was contended on behalf of the appellants (inter alia) that:—

(*a*) Under the terms of the said will of December 13, 1909, the interests of the minor were vested interests and the minor was therefore assessable to super tax in respect of the income arising therefrom.

(*b*) The assessment so far as it was of the amount sufficient to include the income so vested in the minor under the said will was correctly made and should be pro tanto confirmed.

11. The following cases were referred to: *In re Ussher* (1); *Rex* v. *Newmarket Income Tax Commissioners* (2); *Fry* v. *Shiels' Trustees* (3); *Williams* v. *Singer* (4); *Walker* v. *Reith* (5); *Brooke* v. *Inland Revenue Commissioners.* (6)

12. The decision of the Special Commissioners upon the appeal was as follows: "We are of opinion that the income of the minor which is being accumulated by trustees is not 'receivable' by the minor within the meaning of s. 66, sub-s. 2 (*d*), of the Finance (1909–10) Act, 1910, and is not liable to present assessment to super tax. In view of our decision on the first point raised on the hearing of this appeal it is not necessary for us to decide the second point, viz.,—that the Special Commissioners have no power to make an

(1) [1922] 2 Ch. 321.
(2) [1916] 1 K. B. 788; 7 Tax Cas. 49.
(3) 1915 S. C. 159; 6 Tax Cas. 583.
(4) [1921] 1 A. C. 65; 7 Tax Cas. 387.
(5) (1906) 8 F. 381; 43 S. L. R. 245.
(6) [1918] 1 K. B. 257; 7 Tax Cas. 261.

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estimated assessment on the trustee. We discharge the assessment."

13. No question as to figures arose upon this appeal, as it had been agreed between the appellants and the respondent that if the contentions put forward by the appellants were correct the assessment should be 2861*l.*

J. E. Harman (*Sir Patrick Hastings A.-G.* and *R. P. Hills* with him) for the Crown. The gift by the testator in his will of the estate near Watford, land at Bushey, and his interest in No. 21 Soho Square to his eldest son upon his attaining twenty-one is a vested gift to the minor and not merely a contingent gift. The rule is thus stated in Vaughan Hawkins on Wills, 2nd ed., p. 287: "If real estate be devised to A. 'if,' or 'when,' he shall attain a given age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate, subject to be divested upon his death under the specified age: *Edwards* v. *Hammond*. (1) . . . . The rule is the same if the devise be to A. 'at,' 'upon,' or 'from and after' attaining a given age, with the like gift over." On the other hand a bequest of personal estate to "A." "at" a given age or marriage is prima facie contingent. In the present case there is no gift over, the words "failing such son" do not mean failing a son who attains the age of twenty-one years, but failing a son who shall be living at the testator's death. The trustees who receive income for an infant on a vested gift must account for it to the revenue authorities, and it is immaterial whether the income is spent on the infant's maintenance, or whether it is accumulated for his benefit. It is admitted that so far as the income has been applied for the infant's maintenance that the trustees are liable for super tax. The trustees are equally liable to pay super tax on the portion of the income that is accumulated for the benefit of the minor. The Finance (1909–10) Act, 1910, imposed super tax by s. 66, sub-s. 1, "in respect of the income of any

(1) (1683) 1 Bos. & P. N. R. 324*n.*; 3 Lev. 132.

individual, the total of which from all sources exceeds" a certain amount. Sub-s. 2 shows how the total income is to be arrived at. Para. (*d*) provides that "any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable." That sub-section is only a machinery section dealing with the year in which income is to be chargeable. It does not purport to deal with the question whether the income is or is not receivable. Therefore the decision of the Commissioners based upon the ground that the income which was being accumulated was not receivable by the minor within the meaning of s. 66, sub-s. 2, is wrong. The trustees as representing an incapacitated person were required, in accordance with s. 72, sub-s. 2, of the Act of 1910, to make a return of the trust income, including the accumulated income for assessment to super tax. By s. 41 of the Income Tax Act, 1842, a trustee of an infant and having the control or management of the property of such infant is chargeable to income tax in like manner and to the same amount as would be charged if the infant were of full age. So that when a beneficiary is under incapacity he is hit for income tax through his trustee. Lord Cave in *Williams* v. *Singer* (1) expressed the view that a trustee who was under an obligation to accumulate trust income for future distribution might be chargeable with income tax upon such income. The Finance Act, 1917, s. 14, gives relief from income tax in respect of accumulated income in the case of a contingent gift. This points to a distinction where the gift is of a vested interest. The minor in the present case takes a vested interest, but does not receive the income merely because, being an infant, he cannot give a receipt for it. There is no gift over, and therefore it is not a contingent gift. The trustees are liable therefore to pay super tax in respect of the accumulations.

Latter K.C. and *S. G. Turner* for the respondent. A trustee cannot make a return of the total income of his cestui que trust and therefore he cannot make a return of that income for assessment to super tax. Swinfen Eady L.J. however

(1) [1921] 1 A. C. 65, 72.

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held in *Brooke* v. *Inland Revenue Commissioners* (1) that trustees have to make a return as far as they are able, that is so far as the facts are within their knowledge. That decision is binding upon this Court. The trustees occupy a dual capacity—namely, to accumulate the surplus income and invest it, and secondly to pay the guardian of the minor such sum as they think fit for the boy's maintenance. The guardians are alone liable to pay super tax; the trustees are only liable to pay income tax. The liability to pay income tax and the liability to pay super tax are always divorced in the case of trusts. Whether the gift to the minor is a vested gift or a contingent gift, only such part of the income as is applied for the maintenance and education of the boy is liable for super tax. It is only when the trustees exercise their discretion and make a payment in favour of the infant that it becomes the income of the infant and becomes subject to super tax: see *Drummond* v. *Collins* (2), per Lord Wrenbury. The minor could not demand payment of the income from the trustees; it is not in his control, but in that of the trustees, and therefore is not subject to super tax as his income: *Inland Revenue Commissioners* v. *Wemyss*. (3) In the present case the trustees were by the terms of the will bound to accumulate the surplus income. Where income is being accumulated upon a contingency when the person entitled takes the accumulations he takes them as capital and not as income. It was held in *Stocker* v. *Inland Revenue Commissioners* (4) that where a fund was being accumulated in which there was an intervening interest the fund had a separate and independent existence in the hands of the trustees. The test is whether the persons beneficially entitled to the income are given control of the income. In the present case it does not become the money of the minor till he attains the age of twenty-one years, and in the meantime it is the income of the trustees. In *Williams* v. *Singer* (5) Lord Cave pointed

(1) [1918] 1 K. B. 257, 265; 7 Tax Cas. 261, 272.

(2) [1915] A. C. 1011, 1020; 6 Tax Cas. 525, 540.

(3) 1924 S. C. 284; 61 S. L. R. 262.

(4) (1919) 7 Tax Cas. 304.

(5) [1921] 1 A. C. 65, 72; 7 Tax Cas. 411.

out that a trustee under an obligation to accumulate trust income for future distribution might be chargeable with tax upon the income, implying that the beneficiary would not be liable. Under the will the gift of the Oxhey estate was a gift of a contingent interest and not of a vested interest. It was a trust for the eldest son who should attain the age of twenty-one years and not for the eldest son who should be living at the testator's death. The words "failing such son" show that the preceding words are descriptive. Where there is a gift to a person who fills a certain description, the gift is a contingent one, because a person only gets it if he fulfils the description: see *In re Astor*. (1) In *Love* v. *Love* (2) it was held that a bequest of land to W. upon his attaining twenty-three was a contingent gift. In *In re Francis* (3) a devise of real estate to a person when she shall attain the age of twenty-five years was held to be contingent upon her attaining that age.

J. E. Harman in reply. In *In re Ussher* (4) a testatrix devised and bequeathed her residuary real and personal estate to trustees in trust for U. when he should attain the age of twenty-five. She directed the trustees to apply the whole or such part as they thought fit of the income for the maintenance of the legatee. It was held that U. took a vested interest at the testatrix's death. If a gift is a vested gift liability for income and super tax cannot be prevented from arising by the testator providing that the surplus income shall be accumulated. This income is the boy's income, whether it is spent on his maintenance or accumulated for him. The true position expressed in *Williams* v. *Singer* (5) is that the beneficiary is to be charged through the trustee.

ROWLATT J. In this case two questions appear to have been raised before the Commissioners, of which they only decided one. The one which they did not decide was whether the Commissioners had jurisdiction to make an assessment

(1) [1922] 1 Ch. 364, 380, 384.
(2) (1881) 7 L. R. Ir. 306.
(3) [1905] 2 Ch. 295.
(4) [1922] 2 Ch. 321.
(5) [1921] 1 A. C. 65; 7 Tax Cas. 387.

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on the trustee as being a person who had failed to make a return within s. 72, sub-s. 5, of the Finance (1909-10) Act, 1910. They did not decide that point, and Mr. Latter has not argued it here, because it is concluded by authority binding on this Court. But the point is made though not argued, so that it may be open upon a future occasion if necessary.

The point that the Special Commissioners did decide was this. They decided that super tax was not payable in this case because the income was not receivable by the minor. They have taken the word "receivable" from cl. (*d*) of sub-s. 2 of s. 66 of the Act under which this case fell—namely, the Finance (1909-10) Act, 1910, which introduced the super tax. I do not think that they were right in making the point turn on the word "receivable." Sub-s. 2 is not a sub-section which is defining income. It is dealing with the year in which a person's income must be estimated. The word "receivable" does not come in as defining the income chargeable; it comes in merely to connect "income" with "year," any other form of words might have been used just as well. The sub-section which must be looked at in order to see whether or not super tax is payable is not sub-s. 2 at all, but sub-s. 1, which makes super tax payable in respect of "the income of any individual the total of which from all sources exceeds" a certain amount.

In this case the testator by his will disposed of property in two ways. There was a specific devise of certain real estate, as to which a question arises whether the eldest son, who is the boy in respect of whose resources this case arises, took a vested interest or only a contingent interest in that property. As regards the rest and residue of the testator's property, both real and personal, there is no doubt that all the children took a vested interest.

The first point which Mr. Latter makes is that it does not matter whether the interest which the eldest son takes under the will is vested or contingent, because, even assuming that this specific bequest is vested in the eldest son, just as the shares in the residue are vested in all the children under the other part of the will, still, inasmuch as there is a trust to

accumulate a fund during the infancy of the eldest son, subject to a power to the trustees to apply such sum as they think proper for his maintenance, the part of the income which is accumulated is not the income of the minor. It is a very important point, but I have come to the conclusion that he is right. It is perfectly true to say, as Mr. Harman did, that in a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest: but in my judgment it will not come to him as income; it will come to him in the future in the form of capital. The trustees are directed to accumulate the surplus income, and they are bound to comply with that direction and to accumulate it. It is income which is held in trust for him in the sense that he will ultimately receive it, but it is not in trust for him in the sense that the trustees have to pay the income to him year by year while he is an infant. All the minor can get while he is an infant is such amount as the trustees allow for his maintenance. I think that view of the case is supported by what was said in *Inland Revenue Commissioners* v. *Wemyss*. (1) In my judgment it is fallacious to look into the future and say: This fund that is being accumulated is for his benefit and he will get it all. What you have to do is to ask, whether the surplus income that is accumulated is the annual profits and gains of the year of this infant now? I do not think it is. I think this case is quite different from a case where the infant has the right to the money now but where the money remains in the hands of his trustees not because of any directions in the will which directed it to be accumulated, but because he is an infant and cannot receive the money and give a receipt for it, and it therefore remains in the hands of his trustees, being invested but lying ready for him waiting for the time when the infant can give a good receipt for it. I think that case is quite different. In that case the income would be the income of the infant now, although he could not touch it and could not give a receipt for it. But where the will expressly provides that the surplus income shall be accumulated and

(1) 1924 S. C. 284; 61 S. L. R. 262.

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only allows the trustees to spend what they think proper on the minor's maintenance it seems to me that it is not the income of the minor yet. I think there is support for that view in the cases that have been cited. I think the language that was used in the House of Lords in *Drummond* v. *Collins* (1) supports that view. It did not assist in that case, because it was a case of foreign possessions, and it was before 1914. The question in that case arose with regard to the money which was remitted to this country and which was actually expended upon the infants, therefore the point that arises in the present case did not really arise in that case; but there are expressions in the opinions of the learned Lords which, in my judgment, point to this conclusion, that it is only when the discretion of the trustees is exercised, so as to give the infants a portion of the income which was being accumulated for them, that the liability to income tax attaches.

I find also material support for the view I take, although the point did not come directly under discussion, in *Williams* v. *Singer*. (2) Lord Cave in his opinion deals with the provisions in the Income Tax Act, 1842, that make the income of beneficiaries assessable in the hands of their trustee. Then he says (3) there are many cases in which trustees in receipt of trust income may be chargeable to income tax upon such income apart from those provisions, and he instances "a trustee for charitable purposes, or a trustee who is under an obligation to apply the trust income in satisfaction of charges, or to accumulate it for future distribution." If Lord Cave intended to include the case of a trustee under an obligation to accumulate trust income for future distribution, he is in effect saying: Here is income accumulating for future distribution, therefore no beneficiary can be taxed on it now, but the trustee can be taxed independently as being the person in receipt of the income it is sought to tax and as representing the beneficiary. I am not certain that Lord Cave had this case in his mind, but at any rate it is clear that he thought that a trustee who is under an obligation to accumulate income might be in an

(1) [1915] A. C. 1011; 6 Tax Cas. 525. (2) [1921] 1 A. C. 65; 7 Tax Cas. 387.
(3) [1921] 1 A. C. 72; 7 Tax Cas. 411.

altogether different position from a trustee who merely had to hand over the money that he had or to apply it as it came to his hands.

In all the circumstances I think Mr. Latter's point is a good one, and therefore, although I do not put the reasons for my decision in the same way as the Commissioners did, I think their decision was right and that no question of vesting arises. The appeal will therefore be dismissed with costs.

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Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Charles Stevens and Drayton.*

R. F. S.

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April 7.

Landlord and Tenant—Rent Restriction—Letting of Flats—Flats sublet as furnished Flats—Recovery of Possession by Landlord—Application of Act—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 2, proviso (i.).

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling . . . . and every such house or part of a house shall be deemed to be a dwelling house to which this Act applies: Provided that (i.) this Act shall not, save as otherwise expressly provided, apply to a dwelling house bona fide let at a rent which includes payments in respect of . . . . use of furniture."

The owner of a block of flats let three of them to a tenant who furnished two of the flats and then sublet them as furnished flats. The owner subsequently gave notice to the tenant to quit and then brought an action to recover possession of the two flats which had been let furnished:—

Held, that s. 12, sub-s. 2, of the Act of 1920 deals with the status of the premises and not with the variety of tenancies under which the premises are held, and that in deciding whether these premises were let as furnished flats the Court had to look at the letting of the flats to the occupying sub-tenants and not at the letting to the tenant; and as the flats were let to the occupying tenants as furnished flats they were outside the protection of the Act, and the plaintiff was entitled to recover possession.

Glossop v. *Ashley* [1922] 1 K. B. 1 followed and applied.

APPEAL from Lambeth County Court.

The plaintiff was the owner of a block of flats at Brixton. She let three of the flats to the defendant, Mrs. Hunter, who

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lived in one of them herself. The other two flats, which the defendant Hunter hired of the plaintiff on a weekly tenancy at a rental of 19*s.* 6*d.* and 20*s.* 6*d.* per week respectively, she furnished and sublet, one to the defendant Redlar, and the other to one Scott as furnished dwelling houses.

The plaintiff gave notice to quit to the defendant Hunter, and subsequently brought an action in the county court to recover possession of the flats, which had been let furnished by the defendant Hunter, alleging that the premises had been used by her for business purposes—namely, the business of letting furnished apartments.

The county court judge held that the flats were not business premises, but were dwelling houses, and that the defendants were protected by the Rent Restriction Acts. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Archibald Safford for the plaintiff. The decision of the county court judge was wrong. As between the plaintiff and the defendant Hunter these flats were let not as dwelling houses but as business premises, and therefore they are outside the protection of the Rent Restriction Acts. The county court judge was wrong in applying as the test the user of the premises. It was laid down by the Court of Appeal in *Epsom Grand Stand Association* v. *Clarke* (1) that the true test to apply is the purpose for which the premises were let. Here the flats were let to enable the defendant Hunter to carry on the business of letting furnished flats. They are therefore business premises, and it is immaterial for what purpose they were occupied. If however it is necessary to look at the occupation of these premises, the flats were let to the occupying tenants as furnished flats and are therefore within the first proviso to s. 12, sub-s. 2, of the Rent Restriction Act, 1920, and accordingly outside the protection of the Acts. It was decided in *Glossop* v. *Ashley* (2) that it was necessary to look at the letting between the tenant and the sub-tenant and not to the letting as between the landlord and the tenant in order

(1) [1919] W. N. 170. (2) [1922] 1 K. B. 1.

to determine what was the standard rent of the premises. By a parity of reasoning it is necessary in the present case to look at the contract between the tenant—namely, the defendant Hunter—and her sub-tenants in order to see the purposes for which the premises were let. As the flats were let to the sub-tenants as furnished flats they are outside the protection of the Rent Restriction Acts. It is clear that as between the defendant Hunter and her sub-tenants the flats, being let as furnished flats, are outside the protection of the Acts. The same premises cannot at the same time be within the protection of the Rent Restriction Acts for one purpose and outside the protection of the Acts for another purpose. In order to see whether or not premises are within the protection of the Acts one has to look at the tenancy of the occupying tenant. The Rent Restriction Acts were passed for the protection of the tenants in occupation of premises and not for the protection of middlemen who use the premises for the purpose of making a profit.

Maurice Healy for the defendants. Sect. 5 of the Rent Restriction Act, 1920, commences with the words: "No order or judgment for the recovery of possession of any dwelling house" shall be made unless certain conditions are fulfilled. Therefore the first question which the county court judge has to determine is whether the particular house is a dwelling house, and if it is whether it is reasonable in the circumstances to make the order for possession.

[BAILHACHE J. The question is whether it is a dwelling house to which the Act applies.]

There is nothing in s. 12 of the Act of 1920 to prevent a tenant of a dwelling house subletting it with the use of furniture without losing the protection of the Act. In *Collis* v. *Flower* (1) it was argued that the Rent Restriction Acts were only intended to protect tenants in actual physical occupation of the premises, but McCardie J. expressly dissented from that view and said there was nothing in the language of the Acts to justify it. It was held in that case

(1) [1921] 1 K. B. 409.

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that the executor of a deceased tenant was himself tenant of the house within the meaning of, and therefore entitled to the protection of, the Acts, although he was not in actual occupation of the house. The decision in that case was followed in *Mellows* v. *Low* (1) and applied to the case of an administratrix of a deceased tenant, although the administratrix herself never resided in the house. The flats in this case were let to the defendant Hunter for her own occupation or for the occupation of any one to whom she might sublet them. The fact that she receives a rent from her sub-tenants does not make her the less the tenant of the flats. *Glossop* v. *Ashley* (2) is distinguishable, because the question as to what is the standard rent of certain premises is quite different from the question whether certain premises are or are not within the protection of the Rent Restriction Acts. The Court in deciding whether premises are or are not within the protection of the Acts will look only at the tenancies of the person before the Court and not at any other tenancy. It may be that the premises may at the same time be within the protection of the Acts so far as one tenancy is concerned and outside the protection of the Acts so far as a sub-tenancy is concerned. It is clear from s. 1, sub-s. 1 (*b*), of the Increase of Rent, &c. (Amendment), Act, 1919, that the Legislature did not contemplate that an order for possession should be made merely because the tenant sublet the dwelling house, unless he was making an unreasonable profit.

Archibald Safford in reply. *Collis* v. *Flower* (3) was decided upon the ground that physical occupation of premises is not necessary, and therefore the fact that the tenant was not himself in occupation of the premises was irrelevant upon the question whether he was entitled to the protection of the Rent Restriction Acts. *Mellows* v. *Low* (1) merely extends the rule in *Collis* v. *Flower* (3) from an executor to an administrator and decides nothing more. Neither of those cases applies here, because the Courts were merely considering the right of the persons concerned—namely, the executor or

(1) [1923] 1 K. B. 522. (2) [1922] 1 K. B. 1.
(3) [1921] 1 K. B. 409.

administratrix—to sublet; the Courts were not considering the effect on the premises of the subletting.

[ACTON J. Those cases were commented upon by the Court of Appeal in *Keeves* v. *Dean* and *Nunn* v. *Pellegrini* (1), where it was held that a statutory tenant could not assign his rights under the statute.]

In the present case it is not contended that the premises are outside the protection of the Act merely because the defendant Hunter sublet them, but because she sublet them furnished. Either the contention is correct that in deciding whether premises are within the Act the only relevant tenancy to be considered is that under which the occupying tenant holds or else the other alternative must be correct—namely, that there may be two relevant tenancies and that premises may at the same time be within the Act and also not within the Act. But that view is inconsistent with the decision in *Glossop* v. *Ashley*. (2) In that case the argument was put forward on behalf of the landlords that there are as many standard rents as there are tenancies, but Scrutton L.J. pointed out the difficulty that would arise if there were two or more different standard rents at the same time for the same premises. The same reasoning applies to the present case.

BAILHACHE J. This case comes before us on appeal from the judge of the Lambeth County Court and raises a question under the Rent and Mortgage Interest (Restrictions) Act, 1920, which I find difficult to decide. We are very much obliged to counsel for the very clear way in which they have put their arguments. The question arises in this way: The plaintiff is the owner of a block of flats, and she let to the defendant, Mrs. Hunter, three flats. At the time the flats were let they were unfurnished and therefore came within the Rent Restriction Acts. Mrs. Hunter, who was in the habit of letting furnished flats, furnished two of them and then let them as furnished flats, and as between herself and her tenants the flats were outside the Rent Restriction Acts. In that way she may be said to have carried on a business of letting

(1) [1924] 1 K. B. 685. (2) [1922] 1 K. B. 1.

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flats. The first point made by the plaintiff is that she used the premises for business purposes, as she carried on the business of letting flats. I think there is nothing in that point, because business premises are premises in which a business is carried on, and wherever Mrs. Hunter carried on her business of letting flats she did not carry on the business in the flats themselves. Therefore that point fails.

It is then said that the premises being furnished and let by the defendant as furnished flats are outside the protection of the Act by reason of s. 12, sub-s. 2, proviso (i.), which provides that " this Act shall not, save as otherwise expressly provided, apply to a dwelling house bona fide let at a rent which includes payments in respect of . . . . use of furniture." This flat was let at a rent which included payments in respect of the use of furniture. It is therefore contended that it is taken outside the protection of the Act. There is no doubt that as between Mrs. Hunter and her sub-tenants, Redlar and Scott, the flats were let with the use of furniture, and that as between them the flats were outside the protection of the Act. On the other hand it is contended on behalf of Mrs. Hunter that she hired from the plaintiff unfurnished flats and that the fact that she put furniture in the flats before she let them had nothing to do with the plaintiff.

The real question is whether the provision in s. 12, sub-s. 2, proviso (i.), has to do with the status of the premises, or whether it has to do with the respective rights of tenants inter se. I have come to the conclusion that the proviso to s. 12, sub-s. 2, has to do with the status of the premises, and that in a case of this kind one has to consider whether the flats were occupied at the material time as flats let with the use of furniture. If they were, they are within the proviso and therefore outside the protection of the Act. Several cases were cited to us, but this question has not been expressly decided. I have come to this conclusion by reason of the decision of the Court of Appeal in *Glossop* v. *Ashley*. (1) It is true that was not a case of letting furnished flats, but as to the proper standard rent of

(1) [1922] 1 K. B. 1.

certain premises. A landlord had let a public-house to a firm of brewers at a rent of 130*l.* a year, and the brewers let the public-house to a tenant at a rent of 24*l.* a year. The term of the intermediate tenants—namely, the brewery company—came to an end, and the question arose as to what was the standard rent as between the landlord and the occupying tenant. The Court of Appeal came to the conclusion that in deciding what was the standard rent they must have regard to the rent which the occupying tenant paid. I cannot see how by parity of reasoning or analogy we can come to a different conclusion in the present case where the question is not what is the standard rent but what is the status of the premises. In considering whether the flats are let furnished we have to consider how they are let to the occupying tenants. If they are let to them at a rent bona fide including the use of furniture they are outside the protection of the Act, notwithstanding that as between the landlord and the intermediate tenant they were let unfurnished. It seems to me that we must apply the same reasoning in the present case as was applied in *Glossop* v. *Ashley* (1), and hold that notwithstanding the flats were let unfurnished to the defendant Hunter, as she let them as furnished flats they were as furnished flats outside the protection of the Act.

Apart from authority my decision would have been the other way, but we have not been referred to any authority which leads us to decide the other way or prevents us from adopting the reasoning of *Glossop* v. *Ashley*. (1) I can put my judgment in a sentence in this way: The Act deals with the status of premises and not with the variety of tenancies under which the premises are held. The question to be considered is, are the premises let to the occupying tenant as furnished flats? That fixes the status of the premises. The appeal must therefore be allowed.

ACTON J. I agree.

Solicitors for plaintiff: *Dallimore, Pilbrow & Co.*
Solicitors for defendants: *H. I. Sydney & Co.*

(1) [1922] 1 K. B. 1.

R. F. S.

1924
April 15.

VORST *v.* GOLDSTEIN AND OTHERS.

Moneylender—Registration—Business carried on in Partnership—Registration of Partner's Name in full—Transaction by one Partner as Individual—Moneylenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

A person named Louis Vorst was registered under the Moneylenders Act, 1900, as carrying on a moneylending business in partnership with his son under the name of Louis and Sidney Vorst. Louis Vorst lent money and took a security in his own name alone, and then claimed to recover on the security:—

Held, that he could not recover, as he had not taken the security in his registered name. Registration of a man's name as part of a firm-name does not cover business done by him separately.

APPEAL from Bow County Court.

The plaintiff, Louis Vorst, claimed to recover 75*l.*, the balance due on a promissory note for 100*l.* which was signed by the five defendants.

The plaintiff was registered under the Moneylenders Act, 1900, as carrying on in partnership with his son, Sidney Vorst, the business of moneylenders under the name of Louis and Sidney Vorst. Evidence was given that the money in question was lent by Louis Vorst, who took the security in his own name.

Objection was taken in the county court that the plaintiff could not recover because he had not taken the security in his registered name.

The deputy county court judge held that Louis Vorst did not fail to comply with s. 2, sub-s. 1 (*c*), of the Moneylenders Act, 1900 (1), when he took a security for money in his own name merely because the name of his partner did not appear with him as co-lender, seeing that his own name appeared on the register. The deputy county court judge accordingly gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

(1) Moneylenders Act, 1900, s. 2, sub-s. 1: "A moneylender as defined by this Act— . . . . (*b*) shall carry on the moneylending business in his registered name, and in no other name and under no other description . . . .; and (*c*) shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender, otherwise than in his registered name. . . . ."

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R. J. White for the defendants. The decision of the deputy county court judge was wrong. The plaintiff by taking the security in his own name instead of in his registered firm-name committed a breach of the Moneylenders Act, 1900, and therefore was not entitled to recover. Lord Macnaghten said in *Whiteman* v. *Sadler* (1): "If, in violation of the plain words of the Act, a moneylender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided." Lord Dunedin said (2): "It seems to me clear that the object of the Act is to provide, first, for identification of persons carrying on business as moneylenders, and, secondly, to prevent one man carrying on various businesses under a series of aliases. If that is so, it follows clearly that registration of any person, whether as an individual or as a member of a firm, exhausts, so to speak, that person's capacity of registration; for if it were not so, and if he, being actually registered as an individual, was allowed again to register as member of a partnership, he would be truly carrying on the business of moneylender under more names than one." Those dicta apply to the present case. A person cannot carry on the business of a moneylender in his own name and also in partnership.

Louis Green for the plaintiff. The transaction was a good transaction, as Louis Vorst was registered as a moneylender in his own name. It is true that he was registered with another person, but the registration ought to be treated as a joint and several registration. Whether Louis Vorst enters into a transaction by himself or enters into it in partnership with another person he enters into it in his own name. A man may carry on business as a moneylender as an individual and also as a firm provided his full name is registered. There cannot however be two registrations of the same person as carrying on the business of a moneylender—namely, as a partner in a firm and also as an individual. But where the

(1) [1910] A. C. 514, 521. (2) Ibid. 524.

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registration of a person is in his usual name it covers the carrying on business as a moneylender as a partner in a firm and also as an individual.

BAILHACHE J. This case raises an interesting question under the Moneylenders Act, 1900. Louis and Sidney Vorst were registered under the Moneylenders Act, 1900, as moneylenders. The return made by Sidney Vorst states as follows: "The name of the firm to be registered as carrying on the business of moneylending—Louis Vorst and Sidney Vorst." "The persons of whom the firm consists—Louis Vorst, Sidney Vorst," and the return by Sidney Vorst went on to certify that it was a true return of the particulars required by s. 2 of the Moneylenders Act, 1900, and that none of the persons named above was already registered as carrying on the business of moneylending either alone or as a member of any other firm. Louis Vorst and Sidney Vorst represented themselves as carrying on business in partnership in their full names. Louis Vorst carried out a moneylending transaction in his own name and not in that of the partnership. The county court judge held that as Louis Vorst was registered in his own name he was entitled to take a security for money in his own name. In my judgment the county court judge has gone wrong, because if his decision is correct it would mean that a person registered in his own name as a firm would be entitled to carry on business in two ways at the same time—namely, in partnership and also separately on his own account. The Moneylenders Act however does not allow that to be done. The county court judge made a mistake, and the appeal must be allowed.

SANKEY J. agreed.

Appeal allowed.

Solicitors for plaintiff: *Windsor & Brown.*
Solicitors for defendants: *Bruce Millar & Co.*

R. F. S.

ATTORNEY-GENERAL *v.* PEARSON AND OTHERS.

1924
March 18.

Revenue—Estate Duty—Rate of Duty—Determination of—Aggregation of Property—Property passing on Death of Deceased—Property in which Deceased had an Interest—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*d*); *s.* 4.

By a settlement made shortly before his marriage in 1887 the settlor assigned to trustees a policy of assurance on his life, which he had shortly before effected, in trust for himself until the marriage and thereafter to hold the moneys to become payable under the policy in trust to pay the income thereof to his wife during her life and after the decease of the settlor and his wife in trust for the children of the marriage as therein mentioned, and if there should be no child of the marriage who should acquire an interest in the said moneys in trust for the settlor absolutely. By a settlement made shortly before his second marriage in 1897 the said settlor assigned to the trustees of that settlement another policy of assurance on his life, which he had shortly before effected, subject to an annual premium until 1916, in trust for himself until the marriage and afterwards that the trustees should stand possessed of the moneys which should be received by them in respect of the said policy during the joint lives of the settlor and his wife and during the life of the settlor if he should survive her upon certain trusts, and that the trustees should hold the trust funds during the life of the settlor's wife if she should survive upon trust to pay the income to her for life, and after the death of the settlor and his wife upon trust for the children of the intended marriage and the children of the settlor by his former marriage as therein mentioned, and if none of the said children should acquire an interest then the trustees should stand possessed of the trust funds and the income thereof in trust for the settlor absolutely. The settlor died in 1921, having duly paid the premiums on the policies, and was survived by his wife, three daughters of his first marriage and a son of his second marriage:—

Held, that the moneys payable under the policies were an interest purchased or provided by the deceased and accruing or arising on the death of the deceased within the meaning of s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and should therefore be deemed to be property passing on the death of the deceased under that sub-section; that these moneys were property in which the deceased had had an interest; and, consequently, that, under s. 4, for determining the rate of estate duty to be paid on property passing on the death of the deceased, these moneys should be aggregated with the other property so passing.

Attorney-General v. *Robinson* [1901] W. N. 192; [1901] 2 I. R. 67 applied.

Attorney-General v. *Murray* [1904] 1 K. B. 165, 172, observation explained.

INFORMATION on behalf of the Crown.

The information was substantially as follows:—

1. By an indenture of settlement (hereinafter called the

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"1887 settlement") dated December 30, 1887, and made between Cyril Arthur Pearson (afterwards Sir Cyril Arthur Pearson, Bart., and hereinafter called "the settlor") of the first part, Isabel Sarah Bennett, spinster, of the second part, and certain persons therein called "the trustees" of the third part (being a settlement in contemplation of the marriage then intended and shortly afterwards solemnized between the settlor and the said I. S. Bennett) the settlor assigned to the said trustees a policy of assurance on his life for 2000*l.* effected with the Clergy Mutual Assurance Society and dated December 6, 1887, subject to the annual premium of 37*l.* (which policy is hereinafter called "the Clergy Mutual policy") and the said sum of 2000*l.* and all other moneys to become payable thereunder by way of bonus or otherwise In trust for the settlor until the said intended marriage, and from and after the said marriage upon trust that the trustees should receive the moneys to become payable under the said policy and invest the said moneys as therein mentioned and hold the said moneys and the investments for the time being representing the same In trust to pay the income thereof to the said I. S. Bennett if she should survive the settlor during her life and after the decease of the survivor of the settlor and the said I. S. Bennett In trust for such child children or remoter issue of the said intended marriage as the settlor and the said I. S. Bennett should by deed jointly appoint And in default of such appointment then as the survivor of the settlor and the said I. S. Bennett should by deed or will appoint And in default of such appointment In trust for all the children of the said intended marriage who being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age in equal shares And if there should be no child of the said intended marriage who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry In trust for the settlor absolutely And it was provided that it should not be considered a breach of trust for the trustees to permit the said policy to become void

through any means whatever And it was agreed and declared that it should be lawful for the settlor at any time during his life to redeem the said policy by paying to the trustees the sum of 2000*l.* and in such case the policy should be re-assigned to the settlor discharged from the trusts of the settlement of 1887 and the trustees should stand possessed of the sum of 2000*l.* paid to them by the settlor upon the trusts and with and subject to the powers and provisions thereinbefore declared and contained concerning the policy moneys but so that during the joint lives of the settlor and the said I. S. Bennett and the life of the survivor of them every investment should be made with their his or her consent in writing and that the income of the investments for the time being representing the same should be paid to the said I. S. Bennett during her life.

2. The marriage between the settlor and I. S. Bennett was on the petition of the settlor dissolved by a decree nisi dated November 24, 1896, and made absolute on May 31, 1897.

3. There was issue of the said marriage three children only and no more all of whom were daughters and attained the age of twenty-one years or married.

4. By an indenture of settlement (hereinafter called the "1897 settlement") dated June 2, 1897, made between the settlor of the first part, the defendant Dame Ethel Maud Pearson (then and therein described as Ethel Maud Fraser, spinster) of the second part, the defendants James Carter Harrison and Marion Pearson (therein called the "trustees") of the third part and T. C. Palmer of the fourth part (being an indenture of settlement made in contemplation of the marriage then intended and shortly afterwards solemnized between the settlor and the defendant Dame E. M. Pearson) the settlor assigned to the trustees along with other property a policy of assurance on his life effected with the Scottish Widows Fund and Life Assurance Society dated December 18, 1896, for 15,000*l.* (hereinafter called "the Scottish Widows' policy") subject to a premium of 285*l.* payable in each half-year on December 15 and June 15 from June 15, 1896, until 1916 In trust for the settlor until the said intended marriage

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and afterwards upon the trusts thereinafter declared And (cl. 5) it was declared that the trustees should stand possessed of all moneys which should be received by them in respect of the said policy of assurance upon the trusts thereinafter declared with regard to the trust funds in cl. 7 thereof defined And (cl. 9) it was declared that the trustees should hold the trust funds during the joint lives of the settlor and Dame E. M. Pearson and during the life of the settlor if he should survive her upon trust to pay all or any part of the income thereof or apply the same for the maintenance support or benefit of all or any one or more to the exclusion of the other or others of the following persons, namely, the settlor, his said wife, and any of the children of the said intended marriage or the said three daughters of the settlor by his former marriage as the trustees might in their uncontrolled discretion think fit, And subject to such discretionary trust or power the trustees should hold the said income or so much thereof as should not be applied under such discretionary power upon the trusts and for the purposes upon and for which the said income would be held if the settlor were then dead And (clauses 10 and 11) it was declared that the trustees should hold the trust funds during the life of Dame E. M. Pearson if she should survive Upon trust to pay the income thereof to her for life and after the death of the settlor and Dame E. M. Pearson Upon trust for the children of the said intended marriage and the said three daughters of the settlor by his former marriage who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares and if no one of the three said daughters by the settlor's former marriage or no child of the said intended marriage should being a male attain the age of twenty-one years or being a female attain that age or marry then the trustees should stand possessed of the trust funds and the income thereof In trust for the settlor absolutely And (clauses 13, 14 and 15) it was declared that any bonus which might from time to time be declared in respect of the Scottish Widows' policy might at the option

of the settlor be applied either wholly or partially in reduction of the premiums upon such policy and in default and subject to any exercise of the said option should be added to and be subject to the same trusts powers and provisions as the moneys assured by the said policy And that the trustees might during the life of the settlor with his consent in writing while he should pay the premiums in respect thereof or if at any time he should fail to do so and after his decease at the discretion of the trustees sell the said policy of assurance either by way of surrender to the office or otherwise as the trustees might think fit and might on any such surrender or sale accept a fully paid up policy on the settlor's life in whole or partial consideration for such surrender and that the trustees should not be chargeable or responsible for any such policy lapsing or becoming void by any means whatever.

5. After the dissolution of the settlor's first marriage the said I. S. Bennett became the wife of Adrien Durandeau.

6. By an indenture dated January 4, 1898, and made between the settlor of the first part, the said I. S. Durandeau of the second part, the said trustees of the indenture of 1887 of the third part, the defendants Dame Ethel Maud Pearson and Marion Pearson and Peter Keary and the defendant J. C. Harrison of the fourth part, the said E. M. Pearson, M. Pearson, P. Keary and J. C. Harrison were appointed to be trustees of the 1887 settlement in the place of the original trustees thereof who retired therefrom And the said I. S. Durandeau released and assigned to the said E. M. Pearson, M. Pearson, P. Keary, and J. C. Harrison all that her interest in the Clergy Mutual policy and the trust funds and property subject to the trusts of the 1887 settlement to the intent that the trust in the 1887 settlement declared in favour of the said I. S. Durandeau might thenceforth be absolutely determined And the said I. S. Durandeau also released from the power of appointment by the 1887 settlement given to or vested in her the Clergy Mutual policy and the trust funds and property subject to the trusts of the 1887 settlement to the intent that the said power might be absolutely extinguished.

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7. All the premiums payable in respect of the Clergy Mutual policy and the Scottish Widows' policy were duly paid by the settlor during his life.

8. The settlor died on December 9, 1921, having by his will dated July 8, 1921, appointed his wife the defendant Dame E. M. Pearson and his son the defendant Sir Neville Arthur Pearson to be the executors thereof.

9. By an indenture dated August 12, 1922, and made between the defendant Dame E. M. Pearson of the first part, the defendant M. Pearson of the second part, the defendant J. C. Harrison of the third part and the defendants Sir Milsom Rees and Sir N. A. Pearson of the fourth part and expressed to be supplemental to the 1897 settlement Dame E. M. Pearson in exercise of the power given to her by the 1897 settlement appointed the defendants Sir M. Rees and Sir N. A. Pearson to be trustees of the 1897 settlement in the place of the defendant M. Pearson who retired from the trusts thereof.

10. Shortly after the death of the settlor there was paid to the defendants Dame E. M. Pearson, M. Pearson and J. C. Harrison as the trustees of the 1887 settlement in respect of the Clergy Mutual policy the sum of 2096*l.* 11*s.* 2*d.*, and to the defendants J. C. Harrison, Sir M. Rees and Sir N. A. Pearson as the trustees of the 1897 settlement the sum of 16,275*l.* in respect of the Scottish Widows' policy.

11. Upon the death of the settlor there passed and estate duty became payable upon the following properties, namely (*a*) the said sum of 2096*l.* 11*s.* 2*d.*, (*b*) the said sum of 16,275*l.*, (*c*) the settlor's own free property, and (*d*) 1000*l.* fully-paid ordinary shares of 1*l.* each in C. Arthur Pearson, Ld., which were given by the settlor within three years before his death to the defendant Sir Neville Arthur Pearson and were valued at 1000*l.* Under and by virtue of s. 4 of the Finance Act, 1894 (1), for the purpose of determining the rate of estate

(1) Finance Act, 1894 (57 & 58 Vict. c. 30): Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

. . . .

"(*c*) Property which would be required on the death of the

duty all the said premises (*a*) (*b*) (*c*) and (*d*) had to be aggregated so as to form one estate.

12. The said P. Keary died on January 29, 1915, and the defendants Dame E. M. Harrison, Marion Pearson, and J. C. Harrison were at and since the death of the settlor trustees of the 1887 settlement and as such under s. 8, sub-s. 4, of the Finance Act, 1894, accountable for estate duty on the said sum of 2096*l.* 11*s.* 2*d.*

13. The defendants J. C. Pearson, Sir Milsom Rees, and Sir N. A. Pearson were the present trustees of the 1897 settlement, and as such, under s. 8, sub-s. 4, of the Finance Act, 1894, accountable for the estate duty payable in respect of the said sum of 16,275*l.*

14. The defendants Dame E. M. Pearson and Sir N. A. Pearson as the executors of the settlor's will were accountable for the estate duty on the sum of 66,241*l.* 11*s.* 9*d.*, being the value of the settlor's own free property.

15. The defendant Sir N. A. Pearson, as the donee of the

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deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; and

"(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Sect. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof.

"Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; . . . ."

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said 1000 shares, was accountable for the estate duty on the said sum of 1000*l.* being the value of the said shares.

16. Divers applications had been made by the Commissioners of Inland Revenue to such of the defendants as were respectively accountable therefor for payment of the estate duty payable on the said sums of 2096*l.* 11*s.* 2*d.*, 16,275*l.*, 66,241*l.* 11*s.* 9*d.*, and 1000*l.* at the appropriate rate on the basis of all the said sums being aggregated, but the defendants contended that the settlor never had an interest in the said policies or either of them and that each of the said sums of 2096*l.* 11*s.* 2*d.*, 16,275*l.*, and 1000*l.* was to be treated as an estate by itself and was liable for estate duty on that basis only, and the defendants respectively refused to pay estate duty at the appropriate rate applicable on the footing of all the sums upon which estate duty was payable being aggregated together.

The informant on behalf of His Majesty prayed (1.) To have it declared that upon the death of the settlor estate duty became payable upon the said four sums of 2096*l.* 11*s.* 2*d.*, 16,275*l.*, 66,241*l.* 11*s.* 9*d.*, and 1000*l.*, at the rate appropriate on the footing of their being aggregated together for the purpose of determining the rate of duty. (2.) To have it declared (*a*) that the defendants Dame E. M. Pearson, M. Pearson, and J. C. Harrison were accountable for estate duty at the appropriate rate on the said sum of 2096*l.* 11*s.* 2*d.*; (*b*) that the defendants J. C. Harrison, Sir Milsom Rees, and Sir N. A. Pearson were accountable for estate duty at the appropriate rate on the said sum of 16,275*l.*; (*c*) that the defendants Dame E. M. Pearson and Sir N. A. Pearson were accountable for estate duty at the appropriate rate on the said sum of 66,241*l.* 11*s.* 9*d.*; and (*d*) that the defendant Sir N. A. Pearson was accountable for estate duty at the appropriate rate on the said sum of 1000*l.* (3.) That an account might if necessary be directed to ascertain the amount of estate duty payable in respect of each of the said sums at the appropriate rate on the footing of the aforesaid declarations with interest thereon. And that the defendants respectively might be ordered to pay to the said

Commissioners the amount of the said duty and interest for which they were respectively accountable as aforesaid, the informant waiving such penalties as the defendants respectively might have incurred by reason of the said duty not having been paid up to the present time. (4.) and (5.) incidental and other relief.

The defendants in their answer on oath stated (inter alia) (para. 11) that they contended that it was not the case that under and by virtue of s. 4 of the Finance Act, 1894, for the purpose of determining the rate of the estate duty all the said premises, i.e. the said four sums, were to be aggregated so as to form one estate; and that the defendants were advised and contended that the settlor never had an interest in the said sums of 2096*l.* 11*s.* 2*d.* and 16,275*l.* or either of them, and that accordingly such sums should not be aggregated with any other property of the settlor but that each of such sums should be an estate by itself as provided by s. 4 of the Finance Act, 1894; and (para. 16) that the defendants did not contend that the settlor never had an interest in the said policies or either of them; that it was admitted that the settlor did at one time have an interest in each of the said policies; that the defendants' contention (as hereinbefore stated) was that the settlor never had an interest in the said sums of 2096*l.* 11*s.* 2*d.* and 16,275*l.* or either of them and accordingly that each of such sums was to be treated as an estate by itself and was liable for estate duty on that basis only; and that the defendants refused to pay estate duty on the footing of all the said sums upon which estate duty was payable being aggregated together.

Sir Patrick Hastings K.C. and *T. R. C. Dill* (*W. R. Sheldon* with them) for the Crown. The values of the two policies of assurance comprised respectively in the settlements made by the deceased should be included among the property to be aggregated under s. 4 of the Finance Act, 1894, for determining the rate of estate duty to be paid on the death of the deceased. Property comes within that section where it is property passing on the death of the deceased, and property

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in which the deceased had an interest. The property now in question satisfies both of these requirements. The value of the policies is "property . . . . which passes on the death" of the deceased within the meaning of s. 1 of the Act, and therefore for the general purposes of the Act. The value of the policies is the property which passes on the death: the policy moneys which do not as a rule come into existence until the death has taken place are merely the realization of the value. The values of these policies come within s. 1 in another way also—namely, by reason of their coming within s. 2, sub-s. 1 (*d*), which provides that property passing on the death of the deceased shall be deemed to include any "interest purchased or provided by the deceased . . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased": see *Attorney-General* v. *Robinson* (1); *Attorney-General* v. *Murray* (2); and *Attorney-General* v. *Glossop.* (3) Further, the deceased had an interest in these policies and in the policy moneys, inasmuch as under the settlements in the event of the prior trusts failing the policies and moneys were to be held in trust for him absolutely; and that interest was not the less property passing on his death because it was a contingent or expectant interest: per Collins M.R. in *Attorney-General* v. *Glossop.* (4)

Sir W. Finlay K.C. and *C. A. Bennett K.C.* for the defendants. The policies ought not to be included among the property subject to estate duty which is to be aggregated under s. 4 of the Act of 1894 for the purpose of determining the rate of duty. That section only applies to property which passes on the death of the deceased and in which the deceased had an interest; and these policies were not property which satisfied either of these requirements. Neither the policies nor the moneys payable under them come directly within the words of s. 1 "property . . . . which passes on the death" of the deceased. The interest, if any,

(1) [1901] W. N. 192; [1901] 2 I. R. 67.
(2) [1904] 1 K. B. 165.
(3) [1907] 1 K. B. 163.
(4) [1907] 1 K. B. 163, 173.

which the deceased had in the policies was a different interest from that of the persons entitled to the policy moneys on his death, and no interest in either the policies or the policy moneys could be said to "pass" on his death: see per Channell J. in *Attorney-General* v. *Dobree* (1); and also Hanson's Death Duties, 6th ed., p. 96. Sect. 2, sub-s. 1, however, provides that property passing on the death of the deceased (under s. 1) shall be deemed to include certain specified kinds of property, and in particular cl. (*d*) of that sub-section specifies an "interest purchased or provided by the deceased . . . . to the extent of the beneficial interest accruing or arising . . . . on the death of the deceased." Although in a case such as this no interest in the policies may have passed on the death of the deceased, the authorities cited no doubt show that there was an interest in the policies or the policy moneys "accruing or arising" on the death of the deceased within that clause, which is to be deemed to be included in property passing on the death. That interest would accordingly be property passing on the death within the meaning of the first part of s. 4. It does not, however, follow that that interest in the policies or policy moneys ought under s. 4 to be aggregated with the other property of the deceased for the purpose of determining the rate of estate duty payable thereon. It appears from the proviso to that section that it applies only to property in which the deceased had an interest. The scheme of that section is, for its own particular purposes to bring into one mass all the property in which the deceased had an interest, but not property in which he had no interest. Here the deceased had not at the time of his death any actual or beneficial interest in either the policies or the policy moneys. He had an interest in the policies for a time after he had effected them, but he had no interest in them at the time of his death, because he had assigned his interest in them to the trustees of the settlements. Neither had he any interest in the policy moneys, because that interest did not arise until his death. According to the construction on behalf of the Crown the

(1) [1900] 1 Q. B. 442, 445.

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interest in the policy moneys was an interest "accruing or arising" on the death of the deceased within s. 2, sub-s. 1 (*d*), and these words indicate not the transfer upon death to another of something which the deceased had before or at his death, but the springing up upon the death and the vesting in another of property which had not been existing in any one: per Palles C.B. in *Attorney-General* v. *Robinson*. (1)

The property in the policy moneys is no doubt liable to estate duty, but it is not aggregable with the other property of the deceased under s. 4 for the purpose of determining the rate of the duty. The cases cited do not apply to the present case, because they were not cases of the aggregation of property under s. 4.

T. R. C. Dill replied.

ROWLATT J. In this case the question is whether the Crown for the purpose of determining the rate of estate duty to be paid on the property passing on the death of the deceased is entitled to aggregate along with other property under the familiar principle of the Finance Act, 1894, certain moneys the proceeds of two policies of assurance upon the life of the deceased. The policies were included respectively in two settlements made upon two marriages. Each of them was taken out by the deceased a short time before the date of the settlement in which it was included. They were both duly kept up by the deceased. They were settled upon the terms that the moneys payable upon the death of the deceased should go, speaking generally, for the benefit of the wife for life with remainder to children, and in default of issue to the settlor, the deceased.

Though it may not be strictly necessary to decide the point for the purposes of the present case, I may say that it seems to me that in a case like this in which the policy is settled there is no property which passes on the death of the deceased under s. 1 alone, however it would be if the policy were unsettled. Whatever the property in the policy may

(1) [1901] W. N. 192, 199; [1901] 2 I. R. 67, 90.

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be, it has gone from the deceased before his death. If he has no living interest in the policy there is nothing to pass on his death. The property, however, is brought within that section by reason of its coming under s. 2, sub-s. 1 (*d*). [His Lordship read the sub-section, and continued:] That the policy moneys in a case like this are liable to duty under that sub-section is clear upon the authorities beginning with the Irish case of *Attorney-General* v. *Robinson*. (1)

It is no doubt desirable to indicate, though it may seem to be a matter of microscopic analysis, whether, in a case of this kind, the property which is deemed to pass on the death under s. 2, sub-s. 1 (*d*), is the whole annuity or other interest limited to the amount of the beneficial interest accruing or arising on the death, or whether it is the beneficial interest accruing or arising on the death out of the annuity or other interest purchased or provided by the deceased. Counsel for the defendants contended that the reasoning of Palles C.B. in *Attorney-General* v. *Robinson* (1) showed that the property which was to be deemed to pass was the beneficial interest accruing or arising on the death, that is to say the policy moneys which were payable on the death, and the passages which have been read from the judgment of the Lord Chief Baron certainly seem to me to support that view. In *Attorney-General* v. *Murray* (2), where the English Court of Appeal approved of that judgment, Cozens-Hardy L.J. in delivering the judgment of the Court no doubt said: "A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. 1 (*d*)." It seems to me, however, that although the Lord Justice used the word "policy" he was generally approving the reasoning of the Lord Chief Baron, and I do not think that any special stress should be put upon that short observation of the Lord Justice. I therefore think that it may be taken that what passed here was in strictness of language the beneficial interest in respect of the policies accruing or arising on the death of the deceased, that is to say the interest in the policy

(1) [1901] W. N. 192; [1901] 2 I. R. 67.
(2) [1904] 1 K. B. 165, 172.

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moneys. In so far as the policies are property passing on the death of the deceased the defendants agree that estate duty must be paid in respect of them, so that as to that there is no dispute.

The question here is what property is to be aggregated under s. 4 for determining the rate of the estate duty, and for that purpose it does not matter how one understands the effect of the decision in *Attorney-General* v. *Robinson*. (1) From what has been said it seems clear that the policies, in so far as they are to be deemed to be property passing on the death of the deceased, come within the first part of s. 4. The section, however, has a proviso that property so passing, in which the deceased never had an interest, shall not be aggregated with any other property. Looking at the general scope of the Act, one cannot but think that the intention was that, in order that property deemed to pass on the death should be aggregated under s. 4 with other property passing on the death, it must be property in which the deceased enjoyed some interest during his life. The argument of counsel for the defendants is that that which is here to be deemed property passing on the death of the deceased, namely, the beneficial interest in the policies accruing or arising on his death, is property in which he never had an interest. Had the deceased ever an " interest " within the meaning of the Act in the moneys which were to become payable under the policies ? That term is a precise expression having a well understood legal meaning. I cannot see that the deceased never had an interest in this property. On the contrary I think he had an interest in it. He had an interest in the policies before he settled them. Moreover after he settled them he had an interest in the benefit which was going to accrue or arise from them on his death, though it may have been a remote interest which he never could enjoy in possession. He had an interest during all his married life contingently upon the failure of the trusts in favour of his wife and children. If his wife and his children had predeceased him the legal position would have altered,

(1) [1901] W. N. 192; [1901] 2 I. R. 67.

but his interest would then have become a very proximate and extremely valuable interest, and he would have died worth the capital value of the insurance money.

That being so, my judgment must be for the Crown with costs.

Judgment for Crown.

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Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *Carter Harrison & Co.*

J. R.

WING *v.* DENT MAIN COLLIERY COMPANY, LIMITED.

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May 2.

Coal Mine—Provisions as to Safety—Alleged disregard of—Failure to provide Refuge and Bore Holes—Owner and Manager charged with same Offences on separate Informations—Conviction of Manager and Acquittal of Owner—Discretion of Justices—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 44, *sub-s.* 1; *ss.* 68, 75, 101, *sub-s.* 2; *s.* 102, *sub-ss.* 1, 2.

Two informations were laid against a colliery company under the Coal Mines Act, 1911, one of which charged that they had failed to see that a certain mine belonging to them was provided with sufficient refuge holes contrary to s. 44, sub-s. 1, of the Act; and the other of which charged that they had failed to see that sufficient bore holes were kept in the mine contrary to s. 68 of the Act. Two separate informations were also laid against the company's manager, who was one of their directors, charging him with the same offences. The four informations were heard together by the justices, and at the hearing the manager admitted full responsibility, but the company did not prove the facts necessary to exempt them from liability under either the latter part of s. 75 or s. 102, sub-s. 1, of the Act. The justices found that the alleged contraventions of the Act had taken place, and therefore that under s. 75 and s. 101, sub-s. 2, offences had been committed against the Act, and they did not find that the offences were trivial or committed in extenuating circumstances. The justices convicted the manager on the separate informations against him and imposed upon him a penalty and costs; but, considering that penalty adequate, and having regard to the fact that the manager took all responsibility, they dismissed the informations against the company. On a case stated by the justices:—

Held, that the justices should have convicted the company as well as the manager, and that the case must go back to them with a direction to do so.

CASE stated by justices for the petty sessional division of Eckington, in the county of Derby.

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On October 1, 1923, James Edward Wing (hereinafter called "the appellant") preferred two informations against the Dent Main Colliery Company, Ld. (hereinafter called "the respondents"), the first of which charged that they on May 9, 1923, then being the owners of the Dent Main Colliery, Birley Wood, Mosbro, failed to see that the stone drift being a haulage road on which the haulage was worked by mechanical power the gradient of which was approximately 1 in 3 was provided with sufficient refuge holes at intervals of not more than ten yards apart contrary to s. 44, sub-s. 1, of the Coal Mines Act, 1911; and the second of which charged that they on the same day, then being the owners of the said colliery, failed to see that in the third heading to the rise to the air level the silkstone seam which had approached within forty yards of a place containing or likely to contain an accumulation of water or other liquid matter or of disused workings (not being workings which had been examined and found to be free from accumulations of water or other liquid matter) at least one bore hole was constantly kept near the centre of the workings a sufficient distance not being less than five yards in advance and sufficient flank bore holes on each side at intervals of not more than five yards contrary to s. 68 of the said Act.

The appellant also preferred two separate informations against Robert Rolfe (hereinafter called "the manager") for the same offences and on the same facts and in respect of the same time, place and dates as those charged against the respondents.

By consent of the parties all the four informations were heard together, and at the hearing the following facts were proved or admitted:—

The appellant was a solicitor acting for and on behalf of and duly authorized by F. H. Wynne, an inspector of mines for the York and North Midland Division, and as such solicitor he laid the said informations.

The respondents were the owners of the Birley Wood Colliery, Mosbro, within that division, which colliery included the mine in which the said offences were alleged to have been

committed, and the said R. Rolfe was manager of the said mines duly appointed by the respondents, and he was also a director of the company.

A copy of the prescribed abstract of the said Act, and a correct copy of the regulations of the mine, were duly posted up at the said mine.

The coal was reached in the mine by a single drift 6 feet by 5 feet driven across the measures dipping 1 in $2\frac{1}{2}$ and eighty-five yards in length to the point where the seam was intercepted. The drift was almost entirely in rock, and it was driven in the opposite direction to the dip of the seam. All the workings were to the rise of the point where the seam was struck. The drift was started in March, and completed in December, 1923.

There were no refuge holes in the drift, the length and dip of which were found to be as aforesaid, and the haulage was worked by mechanical power.

On the east side of the said mine, that is to the rise of the area of coal which the respondents were working, were some old workings which were known to the respondents, and it was proved to the satisfaction of the justices that the workings had approached within forty yards of a place containing or likely to contain an accumulation of water or other liquid matter or of disused workings (not being workings which had been examined and found to be free from accumulations of water or other liquid matter), and there was not constantly kept extending to a sufficient distance not being less than five yards in advance at least one bore hole near the centre of the workings and sufficient flank bore holes on each side at intervals of at least five yards.

On May 22, 1923, an inrush of water occurred in the air level. A three-inch bore hole was put in by hand at the end of the road and a flank bore hole. The one in the end was driven ten yards when it struck the old waste. The two borers, who were the only persons in the pit at the time, lost their lights in the rush of water which took place, but succeeded in escaping, and the pit became flooded.

The manager gave evidence in regard to the refuge holes

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and bore holes, and admitted that he knew of the old workings, and he also admitted that there were not any bore holes, as required by the Act.

It was contended on behalf of the respondents that the manager was willing to take the full responsibility for any offences which might have been committed. The manager gave evidence and admitted the full responsibility.

The justices were satisfied that the offences charged had been committed, and they convicted the manager on the separate informations laid against him "as manager."

Their attention was called on behalf of the prosecution to s. 102 of the Act of 1911 (1), but no evidence was tendered by the respondents regarding that section except the evidence of the manager.

As to the respondents the justices said: "We having imposed what we considered an adequate penalty and costs upon the manager, who was also a director of the said mine and took all responsibility, exercised our discretion and dismissed the informations against the respondent company."

The question for the Court was whether the justices upon the evidence were right in dismissing the case against the respondents.

W. L. W. Campbell (*H. M. Giveen* with him) for the appellant. The justices ought to have convicted the respondents upon the informations which were preferred against them. The informations charged that in the mine in question the respondents had failed to prevent contraventions of s. 44, sub-s. 1, and s. 68 of the Coal Mines Act, 1911. The justices found that these contraventions had in fact taken place, and they did not find that they were of a trivial character. Consequently, under the first part of s. 75 (1) and under s. 101, sub-s. 2 (1), the respondents were guilty of an offence in respect of each of these contraventions, unless under some other provision of the Act they proved the facts necessary to exempt them from liability. The only provisions of the Act

(1) The relevant provisions of the Act are set out below in the judgment of Lord Hewart C.J.

under which it was open to them to prove facts exempting them from liability are the latter part of s. 75 and s. 102, sub-s. 1 (1), but they did not prove the facts required by either of these provisions.

The justices had no jurisdiction to dismiss the informations against the respondents on the ground on which they did dismiss them—namely, that informations in respect of the same contraventions were preferred against the manager of the mine, who was also a director of the company, that the manager admitted full responsibility for any offences, and that they had convicted the manager and imposed upon him what they considered to be an adequate penalty and costs.

If the justices had found that the charges, though proved, were of a trivial nature or were committed in extenuating circumstances, and had thought that on either of these grounds it was inexpedient to inflict upon the respondents any punishment or any other than a nominal punishment, then no doubt, under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16, and the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1, sub-s. 1, they might have dismissed the informations against the respondents; but the justices have not found, and indeed it has not even been suggested, that the offences were trivial or were committed in extenuating circumstances.

The case should be remitted to the justices with a direction to convict the respondents.

No counsel appeared for the respondents.

LORD HEWART C.J. This appeal by case stated arises out of the hearing of two informations preferred by the appellant against the respondents, a colliery company, under the Coal Mines Act, 1911, for alleged offences against that Act. One of the alleged offences related to the absence of sufficient refuge holes in a mine belonging to the respondents, and the other to the absence of certain bore holes in the mine. At the time when these informations were preferred two separate informations were also preferred against the manager of the

(1) See note (1) ante, p. 392.

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mine, who was also a director of the company, for the same offences, and all the four informations were heard together. The justices found that the offences had been committed, but it was said on the part of the manager that he was willing to take the full responsibility. The justices accordingly convicted the manager, imposing upon him what they considered to be an adequate penalty, and ordering him to pay the costs; and as regards the respondents they say that, having imposed what they considered an adequate penalty and costs upon the manager, who was also a director of the said mine and took all responsibility, they exercised their discretion and dismissed the informations against the respondent company.

The question which this case raises is whether in that state of facts the justices had the power to dismiss the informations against the respondents. The answer to that question depends largely upon the provisions of the Coal Mines Act, 1911, a statute the importance of which from the point of view of any person connected with the working of a coal mine cannot be exaggerated. Sect. 75 of that Act provides: "Any person who contravenes or does not comply with any of the provisions of this Part [Part II.] of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance." Sect. 101, sub-s. 2, provides: "If a mine is not managed in conformity with this Act, the owner, agent, and manager thereof shall each be deemed to be guilty of an offence against this Act." It is thus apparent that we are here dealing with a statute not merely of some, but of great and unusual stringency. Sect. 102, sub-s. 1, provides: "Where proceedings are taken under this Act against the owner or agent of a mine in respect of an offence under this Act for which the owner, agent, or

manager or each of them is liable under this Act, the owner or agent shall not be liable to any penalty if he proves to the satisfaction of the Court—(*a*) that he was not in the habit of taking and did not in respect of the matters in question take any part in the management of the mine; and (*b*) that he had made all the financial and other provision necessary to enable the manager to carry out his duties; and (*c*) that the offence was committed without his knowledge, consent, or connivance"; and it is to be observed that these three clauses are not alternative but cumulative. Sub-s. 2 of that last section provides: "Save as above provided, it shall not be a defence in any proceedings brought against the owner or agent of a mine under this Act in respect of such an offence as aforesaid that a manager of the mine has been appointed in accordance with this Act."

The Act thus provides in effect that if a mine is not managed in conformity with its provisions the owner, the agent, and the manager thereof shall each be guilty of an offence, unless he proves the facts mentioned in the latter part of s. 75, or the facts mentioned in s. 102, sub-s. 1.

In the present case the alleged contraventions of the Act were fully proved, and the respondents did not rely by way of defence either upon the latter part of s. 75 or upon s. 102, sub-s. 1. They relied upon the fact, stated in the case, that the manager was willing to take full responsibility for any offence that might have been committed. The justices apparently were of opinion that the respondents were entitled to rely upon that fact, and they state the ground upon which they based their dismissal of the informations against the respondents to have been that they had imposed what they considered an adequate penalty and costs upon the manager, who was also a director of the mine and took all responsibility.

It does not appear that the justices had jurisdiction under any provision of the Act or otherwise to dismiss the informations against the respondents on the ground on which they state that they did so. It is not denied by counsel for the appellant that there may be circumstances in which, although the facts necessary to establish a charge under the Act of

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1911 are fully proved, the justices may nevertheless dismiss the information. The Summary Jurisdiction Act, 1879, s. 16, provides: "If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the Court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment," then the Court may dismiss the information. That provision has been repeated and extended by the Probation of Offenders Act, 1907, s. 1, sub-s. 1, which provides that where a person is charged before a Court of summary jurisdiction with an offence punishable by such Court, and the Court thinks that the charge is proved but is of opinion, having regard to the character, age, antecedents, health or mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, that it is inexpedient to inflict any punishment or any other than a nominal punishment, it may, among other things, dismiss the information. In the present case it has not been so much as suggested that the offences charged were of a trivial nature, or that they were committed in extenuating circumstances; and indeed it is extremely difficult to understand how the justices could have accepted that proposition consistently with their convicting the manager, because in order to do so it would have been necessary for them to say of the same offences, committed at the same time, but for which two different persons were responsible, that as against one of these persons they were of so grave a nature as to be the subject of a heavy penalty, and nevertheless as against the other so trivial that the charges in respect of them might be dismissed. The justices in this case have based the dismissal of these informations upon no such ground. They have put it upon the ground, as I have already said, that they had imposed what they considered an adequate penalty and costs upon the manager, who was also a director, and took all responsibility.

It may well be that if a question of this kind had arisen in respect of a charge for some other offence, the Court might have been disposed to regard the matter as of a trivial nature; but when I consider the objects of this Act, which is the charter of a large number of persons working underground, and the calculated, deliberate and repeated stringency of its provisions, I cannot regard these offences as of a trivial nature, and I am satisfied that the justices were wrong in dismissing the informations against the respondents.

SHEARMAN J. Though I am not prepared to arrive at a different conclusion, yet I do not entirely take the same view as has been expressed by the Lord Chief Justice with regard to this appeal. Two informations under the Coal Mines Act, 1911, were laid against the respondents, a limited company, who are the owners of the mine in question, for alleged contraventions of the Act, and two separate informations in respect of the same matters were laid against the manager, who is also a director of the company. The facts were proved, and the manager admitted full responsibility. The justices, having heard the case, were satisfied that the offences had been committed and that they were not trivial but substantial offences, and they came to the conclusion that they were offences which could be properly punished by a fine of 20*l.* and full costs. Inasmuch, however, as the actual offences were the same, although two persons were responsible for them, they imposed the whole of that fine upon the manager and dismissed the informations against the respondents. It is obvious that the justices dismissed the informations against the respondents because they thought that it was within their power to convict one of the defendants only and not both. I agree that they had no right to do that. They ought to have convicted both the manager and the respondents.

After they had convicted both defendants they might, however, have imposed a substantial penalty upon one of them only. If they were of opinion that 20*l.* was an adequate penalty for the offences, then, after having convicted both the

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respondents and the manager, it would have been open to them to impose a fine of that amount and costs upon the respondents and a merely nominal fine of say one shilling upon the manager, or a fine of the full amount and costs upon the manager and a merely nominal fine upon the respondents. In my opinion the justices were wrong in not convicting the respondents, and the case should go back to them to be reconsidered, with a direction to convict the respondents as well as the manager.

I do not say a word against the necessity of enforcing this Act stringently, but I do not think that this was a well chosen case to bring up for the purpose of emphasizing that necessity.

ROCHE J. I agree. The principles laid down in *Phillips* v. *Evans* (1) seem to me to be those which are applicable to this case. No doubt is thrown either in that case or in this upon the right of justices in proper circumstances to dismiss a case, even though the offence be proved; but it is clear for the reasons stated in the judgments which have already been delivered that this case is not brought within, and the justices did not attempt to bring it within, the category of cases in which that power can be exercised.

Appeal allowed. Case remitted.

Solicitor for appellant: *The Treasury Solicitor.*

(1) [1896] 1 Q. B. 305.

J. R.

DENNIS *v.* MILES.

1924
May 2.

Motor Omnibus—Alleged Overcrowding—Stage Carriage—Stage Carriages Act, 1832 (2 & 3 *Will.* 4, *c.* 120), *ss.* 5, 6, 7—*Railway Passenger Duty Act*, 1842 (5 & 6 *Vict. c.* 79), *ss.* 13, 15—*Customs and Inland Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *s.* 39; *Sch. E—Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 1.

The Stage Carriages Act, 1832, s. 5, contained a definition of "stage carriage" which did not extend to any carriage impelled otherwise than by animal power. The Railway Passenger Duty Act, 1842, s. 13, provides that no stage carriage shall carry at one time more than a limited number of passengers. In 1869 s. 5 of the Act of 1832 was repealed.

The Locomotives on Highways Act, 1896, s. 1, sub-s. 1, provides that certain vehicles propelled by mechanical power and under a certain weight (subsequently increased by statutory Orders) are to be light locomotives; and by cl. (*b*) of that sub-section a light locomotive is to be deemed to be a carriage within the meaning of any Act, and if used as a carriage of any particular class it is to be deemed to be a carriage of that class, and the law relating to carriages of that class is to apply accordingly:—

Held, under these provisions of the Act of 1896, that a motor omnibus below the prescribed limit of weight plying by a fixed route between fixed points was a light locomotive, that it was to be deemed to be a carriage within any other Act, and that, inasmuch as it was used as a carriage of the particular class known as a stage carriage, the law relating to carriages of that class applied to it; and, consequently, that it should not carry a greater number of passengers than was allowed by s. 13 of the Act of 1842.

CASE stated by justices for the county of Norfolk.

On October 2, 1923, an information was laid by William Dennis, inspector of police (hereinafter called "the appellant"), under the Railway Passenger Duty Act, 1842, ss. 13 and 15 (1), against William George Miles of Hunstanton,

(1) The Stage Carriages Act, 1832, provided:—

Sect. 4: That certain duties should be imposed in respect of every stage carriage according to the distance travelled thereby and the number of passengers carried therein.

Sect. 5: ". . . . every carriage used or employed for the purpose of conveying passengers for hire to or from any place in Great Britain, and which, when passing along any highway or other road, shall travel at the rate of three miles or more in the hour, shall, without regard to the form or construction thereof, be deemed and taken to be a stage carriage within the meaning of this Act; . . . .; and . . . ., it shall be sufficient to describe any carriage used or employed as aforesaid by

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Norfolk, motor driver (hereinafter called "the respondent"), for that the respondent on September 25, 1923, at the parish

the term 'stage carriage,' without further or otherwise describing the same: Provided always, that the said term 'stage carriage' shall not be deemed to extend to . . . . any carriage drawn or impelled by the power of steam, or otherwise than by animal power."

The Railway Passenger Duty Act, 1842, provides:—

Sect. 1: That certain duties including the duty imposed by the Act of 1832 in respect of any stage carriage should be repealed.

Sect. 2: That in lieu of these duties certain new duties should be levied.

Sect. 13: "And whereas the repealing of the duties in respect of the passengers to be conveyed by stage carriages in Great Britain, and granting a uniform rate of duty on stage carriages in lieu thereof, will render certain regulations necessary for preventing the overloading of such carriages . . . .; be it therefore enacted, That no stage carriage shall be allowed to carry at one time a greater number of passengers . . . . than the same is constructed to carry according to the regulations of this Act; and that no such carriage shall be deemed to be constructed to carry a greater number of passengers than the same will contain at one time, upon fit and proper seats provided therein or thereupon for that purpose, allowing for every passenger, on an average, upon each and every separate seat, a space convenient for sitting thereon of sixteen inches, measuring in a straight line lengthwise on the front of each seat: Provided always, that no child under five years of age, sitting in the lap, shall be deemed a passenger within the meaning of this Act."

Sect. 15: "That if the number of passengers at any one time conveyed in, upon or about any stage carriage shall be greater . . . . than the same is constructed to carry according to the regulations of this Act . . . . the driver and conductor or guard thereof . . . . shall forfeit the sum of 5*l*."

The Customs and Inland Revenue Act, 1869, s. 39, repealed certain sections of the Act of 1832, including ss. 4 and 5 thereof.

The Locomotives on Highways Act, 1896, provides:—

Sect. 1: "(1.) . . . . any . . . . enactment restricting the use of locomotives on highways and contained in any public general or local and personal Act in force at the passing of this Act, shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotive not to exceed in weight unladen four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause; and vehicles so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives. Provided that . . . .

"(*b*) a light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public general or local, and of any rule, regulation, or byelaw, made under any Act of Parliament, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply accordingly."

of Gaywood in the said county being the driver of a certain stage carriage with four wheels to wit a motor omnibus and travelling on the King's highway and employed as a public stage carriage for the purpose of conveying passengers for hire to and from Hunstanton and King's Lynn and intermediate places in the said county and which said carriage was then and there constructed to carry thirty-three passengers and no more exclusive of the driver and the conductor or guard according to the regulations of the statute in that behalf, unlawfully did carry and convey and suffer and permit to be carried and conveyed on or about the said carriage more passengers than the said carriage was constructed to carry or the number allowed for that purpose by the said Act.

On October 15, 1923, the information was heard and determined by the justices.

At the hearing of the information the following facts were admitted or proved :—

(*a*) On September 25, 1923, the respondent was driving motor omnibus A.H.8736 from Hunstanton to King's Lynn.

(*b*) The said motor omnibus plied at fixed times and by fixed routes between fixed points in Hunstanton and King's Lynn.

(*c*) The said motor omnibus was licensed as a hackney carriage (thirty-nine seats) by the corporation of the borough of King's Lynn and bore a hackney carriage excise licence issued under the Roads Act, 1920 (10 & 11 Geo. 5, c. 72), and the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), for which 70*l.* had been paid, and it bore a plate with the words "Hackney Carriage—Max : seats." The vehicle did not carry any indication of the number of persons to be carried therein. The weight of the vehicle unladen was 4 tons 10 cwt.

(*d*) The seating capacity of the vehicle calculated according

Since the last-mentioned Act, the maximum weight of the vehicles to which it applies has been increased : see Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 12, sub-s. 1 ; Heavy Motor Car Order, 1904 (St. R. & O., 1904, No. 1809), art. 3 ; and Heavy Motor Car (Amendment) Order, 1921 (St. R. & O., 1921, No. 906), art. 1.

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to s. 13 of the Railway Passenger Duty Act, 1842, was now thirty-three persons. Seats for six additional passengers had been previously taken out by the owner; hence the thirty-nine mentioned in the licence.

(*e*) The appellant and another officer of the Norfolk Constabulary stopped the said motor omnibus at the London and North-Eastern Railway crossing, Lynn Road, Gaywood, within the area of the Freebridge Lynn Rural District Council and in the administrative county of Norfolk. The vehicle then contained fifty-three adult passengers and two children, and of these persons some seven were standing on the steps and in the driver's cab.

The appellant contended that the vehicle was a stage carriage within the Act of 1842 and came within the scope of that Act so far as it regulates stage carriages in the interests of the public safety; that when outside the borough of King's Lynn the vehicle had a dual status, as a stage carriage and as a hackney carriage; and that the Public Health Act, 1875, s. 171, transferred the control of hackney carriages to urban sanitary authorities only.

The respondent contended that the Act of 1842 was a taxing statute only; that so far as regards hackney carriages it was by implication repealed by the Towns Police Clauses Acts, 1847 (10 & 11 Vict. c. 89) and 1889 (52 & 53 Vict. c. 14); that the control of hackney vehicles was by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, transferred to local authorities, who must rely on their by-laws; that as there were no county by-laws for the control of hackney vehicles the Norfolk constabulary had no jurisdiction to control the number of persons carried on the motor omnibus; that the day in question was a market day, and that Information Circular No. 3 (March 9, 1921) issued by the Ministry of Transport suggested that additional passengers should be allowed on market days, wet nights, etc.; and that the motor was capable of carrying the fifty-three passengers then conveyed.

The justices were of opinion that the Norfolk County Council having failed to make by-laws under the Towns Police

Clauses Acts had no control over the number of passengers permitted to be carried in the omnibus driven by the respondent; that the view of the respondent was correct and the arguments of his counsel sound in law; that the Act of 1842—passed more than eighty years ago, when road transport by motor was not even dreamt of—could not possibly be used as the basis of an information at the present day; that the respondent had paid the highest tax chargeable under the Roads Act, 1920, s. 1, and the Finance Act, 1920, s. 13; Second Schedule, cl. 3, for a hackney motor seating more than thirty-two persons 84*l.* in the Metropolitan Police area and such other districts as the Ministry of Transport may fix and in all other districts 70*l.* tax; that as the highest tax had been paid by the respondent he was entitled, if called upon, to carry more than thirty-two passengers: see Ministry of Transport Circular 9/3/21, it being alleged by him that the vehicle was very strongly built and capable of safely carrying more than the thirty-two passengers if they cared to stand.

The question for the Court was whether the justices were right in dismissing the case, or whether they should have dealt with the case as coming within the Act of 1842, in which latter event the case should be remitted to them with a direction to convict.

Montgomery K.C. and *Leighton* for the appellant. The motor omnibus in question was a stage carriage within the meaning of the Railway Passenger Duty Act, 1842, ss. 13–15, and the justices ought to have convicted the respondent. It is true that the Stage Carriages Act, 1832, s. 5, contained a definition of "stage carriage" which did not include any carriage impelled otherwise than by animal power; and that that section was in operation when the Act of 1842 was passed. The restrictive definition of stage carriage given in that section is not, however, included in the Act of 1842 by the express provision of that or any other Act. Nor can it be said to be imported into that Act by necessary implication, because the expression "stage carriage" means at common

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law any public carriage travelling regularly by stages along a fixed route: *Reg.* v. *Ruscoe* (1); and it does not appear that it is not to be understood in that larger sense in the Act of 1842. In any case, s. 5 of the Act of 1832 was repealed by the Customs and Inland Revenue Act, 1869, s. 39, and the limiting definition which it contained ought therefore to be treated as if it had never existed, and ought not to be read into the Act of 1842. It is quite possible to hold that a vehicle may be a stage carriage under the Act of 1842, though not under the Act of 1832: per Lord Alverstone C.J. in *Brian* v. *Aylward.* (2) Further, even if the provisions of the Act of 1842 as to a stage carriage did not previously extend to a vehicle propelled by mechanical power, subsequent legislation has made them directly applicable to vehicles of that description. The Locomotives on Highways Act, 1896, s. 1, sub-s. 1, provides that enactments restraining the use of locomotives on highways shall not apply to any vehicle propelled by mechanical power if under three tons in weight unladen, the vehicles so excepted being referred to as "light locomotives"; and cl. (*b*) of that sub-section provides that a light locomotive shall be deemed to be a carriage within the meaning of any Act, and if used as a carriage of any particular class shall be deemed to be a carriage of that class, and that the law relating to carriages of that class shall apply accordingly. The Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 12, sub-s. 1, provides that regulations made under the Act of 1896 may as respects any class of vehicle mentioned in the regulations increase the maximum weight. The Heavy Motor Car Order, 1904 (St. R. & O. 1904, No. 1809), art. 3, provides that a heavy motor car may be used on a highway if its weight unladen does not exceed five tons; and the Heavy Motor Car (Amendment) Order, 1921 (St. R. & O., 1921, No. 906), art. 1, extends the weight to seven and a quarter tons. The effect of art. 3 of the Order of 1904 is that a vehicle propelled by mechanical power, if it is under five tons in weight unladen, is a light locomotive within s. 1, sub-s. 1, of

(1) (1838) 8 Ad. & E. 386; 3 N. & P. 428.

(2) (1902) 18 Times L. R. 371, 372.

the Act of 1896: *Evans* v. *Nicholl*. (1) The motor omnibus in question was a light locomotive under the Act of 1896, s. 1, sub-s. 1, as extended by the Orders, and, as it was used as a carriage of the class known as a stage carriage, it shall, under cl. (*b*) of that sub-section, be deemed to be a stage carriage, and the law relating to stage carriages shall apply to it. It follows that ss. 13 and 15 of the Act of 1842 apply to the motor omnibus, and as it carried a greater number of passengers than is allowed by the former section the respondent is liable to the penalty imposed by the latter section.

Craig Henderson K.C. and *L. W. J. Costello* for the respondent. The motor omnibus in question was not a stage carriage within the meaning of the Railway Passenger Duty Act, 1842, and the information was rightly dismissed.

The Stage Carriages Act, 1832, contained a complete code of the law relating to stage carriages. It gave a careful definition of the term "stage carriage," which excluded any carriage impelled otherwise than by animal power. It imposed an excise duty in respect of the number of passengers carried by a stage carriage, and also in respect of the mileage traversed by it, and required a person keeping or using a stage carriage to have a licence showing the authorized number of passengers and mileage. The Act of 1842 repealed the excise duty in respect of the passengers, though not in respect of the mileage, and as the limitation on the number of passengers would thus have been removed, it substituted, for the protection of the public, fresh provisions in ss. 13–15, limiting the number of the passengers. In the absence of any indication of a contrary intention, it must be presumed that the expression "stage carriage" has the same meaning in the later Act of 1842 as it had in the earlier Act of 1832: *Lennon* v. *Gibson and Howes* (2), and therefore excludes carriages not impelled by animal power. The Act of 1842, in so far as it relates to stage carriages, should be regarded as a modification of the code of 1832 relating to these vehicles. The Customs and Inland Revenue Act, 1869,

(1) [1909] 1 K. B. 778. (2) [1919] A. C. 709.

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repealed s. 5 of the Act of 1832, containing the definition of stage carriage, and all the statutory provisions imposing excise duties in respect of carriages of that class. After the passing of that Act there remained in effect only two classes of carriages—namely, "carriages" unaffected by special statutory provisions, and "hackney carriages" under the Towns Police Clauses Acts, 1847 and 1889, and the Public Health Act, 1875.

In ss. 13–15 of the Act of 1842, which remain unrepealed, the expression "stage carriage" must still retain its original meaning excluding any carriage impelled by mechanical power. The repeal of the Act of 1832 does not affect the definition given to the term "stage carriage" by that Act: *Parker* v. *Talbot*. (1) When horse drawn stage coaches disappeared these provisions became practically obsolete. As mechanically propelled vehicles gradually came into existence the Legislature provided for them not by extending the old enactments to them, but by making new enactments. Thus, the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 4, sub-s. 1, abolished the existing excise duties on carriages and imposed fresh duties on certain carriages drawn by horses or propelled by mechanical power. It is true that the motor omnibus in question is a light locomotive within the meaning of the Locomotives on Highways Act, 1896, s. 1, sub-s. 1, as extended by the Heavy Motor Car Orders, 1904 and 1921, and cl. (*b*) of that sub-section no doubt provides that a light locomotive shall be deemed to be a carriage within any Act, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply. It is said that under that clause this motor omnibus is to be deemed to be a carriage of the stage carriage class, and that the law relating to carriages of that class, including ss. 13–15 of the Act of 1842, shall therefore apply to it. If, however, that class of carriages and the law relating to it have in effect been repealed, as it is submitted that they have, there is no substance in this contention. Further, if by s. 1, sub-s. 1 (*b*),

(1) [1905] 2 Ch. 643.

of the Act of 1896 this motor omnibus is brought within ss. 13–15 of the Act of 1842, it can only be by reason of its being a light locomotive within the Act of 1896 and the Orders thereunder, and the charge against the respondent ought therefore to have been made under the latter Act and Orders. In the Act of 1896 there is no provision making that Act applicable to a vehicle of any class which would otherwise be inconsistent with its character as a light locomotive.

The case of *Phesse* v. *Fisher* (1), which was a decision under the Act of 1896, has no direct bearing upon the present case.

LORD HEWART C.J. This is a case stated for the opinion of the Court by justices for the county of Norfolk, and it seems at first sight to be more complicated than in fact it is. It arises upon an information preferred by the appellant, an inspector of police, against the respondent, under the Railway Passenger Duty Act, 1842, ss. 13 and 15, alleging that the respondent being the driver of a motor omnibus employed as a stage carriage carried on the said carriage more passengers than the number allowed by that Act. [His Lordship read the portion of the case setting forth the facts admitted or proved at the hearing and continued :] The justices having found these facts and expressed certain opinions, stated that in their view the Act of 1842 "passed more than eighty years ago, when road transport by motor was not even dreamt of, could not possibly be used as the basis of an information at the present day"; and they dismissed the information. The question for the Court is whether the justices were right in dismissing the information and in dealing with the matter as not falling within the Act of 1842.

It is to be observed that the Stage Carriages Act, 1832, s. 5, contained a definition, and a limiting definition, of the expression "stage carriage." The part of the definition which is material for the purposes of this case is that which states that the expression shall not be deemed to extend to

(1) [1915] 1 K. B. 572.

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or to include "any carriage drawn or impelled by the power of steam, or otherwise than by animal power." When the Act of 1842, under which this information was laid, was enacted, the Act of 1832 was still in full force, and it is said on behalf of the respondent that the meaning of the expression "stage carriage" in ss. 13–15 of the Act of 1842 is that which is to be found in s. 5 of the earlier Act of 1832. If the relevant legislation had ended with these Acts that might have been true. But at least two important Acts affecting the matter have been passed since. The Customs and Inland Revenue Act, 1869, s. 39, has repealed s. 5, the definition section, of the Act of 1832. It also repealed certain sections of the Act of 1842. But it did not repeal ss. 13–15 of that Act, and the strict limitation imposed by these sections upon the number of persons allowed to be carried in a stage carriage therefore remained in force. Subsequently motor vehicles came into use, and further legislation became necessary. The Locomotives on Highways Act, 1896, s. 1, sub-s. 1, has provided that the enactments restraining the use of locomotives on highways should not apply to certain vehicles propelled by mechanical power if under a specified weight, these vehicles being in the Act referred to as "light locomotives." By the Heavy Motor Car Orders, 1904 and 1921, the weight of these vehicles has been increased, and is now sufficiently large to include the weight of the vehicle here in question—namely, 4 tons 10 cwt. Clause (*b*) of the last mentioned sub-section provides that a light locomotive shall be deemed to be a carriage within the meaning of any Act, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and that the law relating to carriages of that class shall apply accordingly. On the day on which the appellant stopped the motor omnibus in question it was therefore a light locomotive within the Act of 1896, it was also a carriage within the meaning of any Act relating to carriages, and as it was being used as a carriage of the particular class known as a stage carriage, it must therefore be deemed to have been a stage carriage; and the law relating to stage carriages must

apply to it accordingly. Among the law relating to stage carriages there remained ss. 13 and 15 of the Act of 1842, under which this information is laid.

I therefore think that the justices were wrong in dismissing the information, and that the case should be remitted to them with a direction to convict the respondent.

SHEARMAN J. I am of the same opinion. The respondent was driving the motor omnibus in question on a journey which began in one urban district and ended in another, but one stage of which passed through the area of a rural district council. Though the vehicle was a hackney carriage when in an urban district, it was no longer a hackney carriage when it went outside that area into a rural district.

Assuming that the Railway Passenger Duty Act, 1842, in so far as it has not been expressly repealed, is still in operation, there can be no doubt that this vehicle was a stage carriage within the meaning of that Act and was overcrowded, contrary to its provisions. The justices appear to have been of opinion that that Act has become entirely obsolete, but no serious attempt has here been made to support that view. The argument mainly relied upon on behalf of the respondent is that s. 5 of the Stage Carriages Act, 1832, gave a definition of the term "stage carriage," which limited it to a carriage drawn by animal power only, that in the Act of 1842 the term must have the same meaning, and, therefore, that ss. 13 and 15 of the latter Act cannot apply to this motor omnibus. The Customs and Inland Revenue Act, 1869, however, as the result no doubt of careful consideration, repealed certain provisions of both these earlier Acts. It repealed s. 5, the definition section, of the Act of 1832, and it also repealed certain sections of the Act of 1842, but it was careful to leave unrepealed ss. 13, 14, and 15 of that Act, and they have remained in force ever since. The Act of 1869 had the effect of leaving the term "stage carriage" undefined. The Locomotives on Highways Act, 1896, s. 1, sub-s. 1, after referring to certain vehicles mechanically propelled as light locomotives, provides in

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cl. (*b*) that a light locomotive if used as a carriage of any particular class shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply to it. It is thus clear that, as this motor omnibus, though mechanically propelled, was used as a stage carriage, ss. 13 and 15 of the Act of 1842 apply to it. The excuse for the justices in having come to a different conclusion is that the Act of 1896 was never brought to their notice.

In my opinion, the case should go back to the justices with a direction to convict.

ROCHE J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. A. Brown, Norwich.*

Solicitors for respondent: *Stanley & Co.*

J. R.

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May 27.

[IN THE COURT OF APPEAL.]

ANGLO-BALTIC AND MEDITERRANEAN BANK *v.* BARBER AND COMPANY.

Company—Judgment against—Voluntary Liquidation—Stay of Execution—Property divisible among Creditors—Damages recoverable by Company from Third Party based on Company's Liability to Judgment Creditor.

The manager of a company fraudulently and without authority accepted bills of exchange in the company's name, and upon those bills the company was sued to judgment by the holders. After the commencement of the action the company went into voluntary liquidation. The company subsequently recovered judgment in an action against a third party for damages for having wrongfully facilitated the commission of the above fraud, and for having thereby rendered the company liable on the bills. The judgment creditors in the first action then sought to attach under a garnishee order the money so payable to the company by the third party. On an application by the company to stay the garnishee proceedings:—

Held, that where a judgment is recovered against a company which is in voluntary liquidation the invariable practice of the Court is to stay execution of the judgment unless there are very exceptional

reasons for exercising its discretion otherwise, and the fact that the only right of the company to recover the money claimed from the garnishees was based upon the company's liability to the judgment creditors was not such an exceptional circumstance as to take the case out of the general rule.

APPEAL from Swift J. at chambers.

The action was brought to recover the sum of 24,000*l.* due upon two bills of exchange, for 10,000*l.* and 14,000*l.* respectively, drawn by E. F. Lamb, accepted by the defendants, and discounted by the plaintiffs. The action on the former bill was begun on August 6, 1920, and that on the second bill shortly afterwards, the two actions being consolidated on October 18, 1920. The bills in question had been accepted in the name of the defendants, fraudulently and without their authority, by one Tremain, their manager. Tremain had also, in fraud of the defendants, accepted in their name and without their authority seven more bills for the aggregate amount of 32,500*l.*, which were discounted by other persons. The defendants paid the last-mentioned bills to the holders at maturity. At the time that the said bills were accepted Tremain had a private account with Barclays Bank, and Barber & Co. on March 2, 1921, commenced an action against that bank, in which they alleged that Lamb the drawer of the bills also had an account with Barclays Bank, that Lamb's account was overdrawn, that a Mr. Davis, the manager of Barclays Bank, in order to secure the payment of the overdraft, fraudulently conspired with Tremain and Lamb that Tremain should accept bills drawn by Lamb upon Barber & Co., and should use a sufficient portion of the proceeds of the bills to secure Lamb's account; that in pursuance of the conspiracy Tremain accepted the whole of the nine bills in question, amounting in all to 56,500*l.*, and paid the proceeds into his own account, applying a portion for the purpose of securing Lamb's account as agreed. Alternatively Barber & Co. claimed that at the time when Davis placed the proceeds of the bills to Tremain's account he was guilty of negligence, inasmuch as he knew that Tremain was the manager of Barber & Co. and omitted

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to make any inquiries whether he had authority to accept bills on their behalf. Under these circumstances Barber & Co. claimed to recover from Barclays Bank the whole of the 56,500*l.* On March 8, 1921, Barber & Co. passed a resolution for a voluntary winding up. On July 28, 1921, the liquidator consented to judgment for the Anglo-Baltic and Mediterranean Bank for the 24,000*l.* claimed from Barber & Co. On March 25, 1924, Barber & Co.'s action against Barclays Bank was settled on the terms of the bank paying to Barber & Co. the sum of 9730*l.*, all charges of fraud and negligence against Davis being withdrawn. On April 11, 1924, the plaintiffs, the Anglo-Baltic, &c., Bank, obtained a garnishee order nisi against Barclays Bank under which they sought to attach a sum of 4150*l.*, being a portion of the 9730*l.* payable by Barclays Bank to Barber & Co. under the above settlement. The reason why they did not claim to attach the whole of the 9730*l.* was that that sum was treated as being a payment of so much in the £ on the whole of the 56,500*l.* originally claimed; that of that 56,500*l.* 32,500*l.* was in respect of bills with which the Anglo-Baltic had nothing to do; and it was thought that the proportion of the 9730*l.* referable to the 32,500*l.* claim was properly divisible by the liquidator among the creditors rateably, but that the proportion which was referable to the 24,000*l.* claimed by the Anglo-Baltic stood on a different footing, being only recoverable from Barclays Bank because Barber & Co. owed it to the Anglo-Baltic. They accordingly limited the attachment to 4150*l.*, that sum bearing to 9730*l.* the same proportion that 24,000*l.* bore to 56,500*l.* The liquidator thereupon took out a summons to stay the execution of the plaintiffs' judgment. The Master made the order asked and discharged the garnishee order nisi, upon the ground that Barber & Co. were being wound up. On appeal Swift J. ordered the stay of execution to be removed upon the ground that the money payable by Barclays Bank was in the nature of an indemnity for a payment which Barber & Co. were under a liability to make to the plaintiffs, and could not properly be regarded

as part of the assets divisible among the creditors of the company.

The liquidator appealed.

Cunliffe K.C., *Jowitt K.C.* and *Cyril Asquith* for the appellants. With respect to the practice of the Court as to staying execution of a judgment against a company in liquidation there is no substantial difference between a compulsory winding up and a voluntary winding up. By s. 193 of the Companies Act, 1908: "Where a company is being wound up voluntarily the liquidator . . . . may apply to the Court . . . . to exercise all or any of the powers which the Court might exercise if the company was being wound up by the Court." In Palmer's Company Precedents, Part II., p. 865, it is pointed out that although s. 142 of the Companies Act, 1908, which provides that "When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court" does not in terms apply to a purely voluntary winding up, "It was settled, however, before the Judicature Act, 1873, that in a voluntary winding up the Court would in general, under ss. 85 and 138 of 1862, (now ss. 140 and 193 of 1908,) restrain actions and proceedings against the company . . . . and the Judicature Act has not altered the practice." There were no special circumstances in the present case warranting the Court in departing from the general practice. The money recovered from Barclays Bank formed part of the general assets of the company, and was divisible under s. 186 among the creditors pari passu.

Stuart Bevan K.C. and *O'Hagan* for the respondents. There is this distinction between a compulsory and a voluntary winding up that in the case of the former any execution put in force against the effects of the company after the commencement of the winding up is ipso facto void under s. 211; whereas in the case of a voluntary winding up there must be an application to the Court to stay, which under s. 193, sub-s. 2, the Court has a discretion to refuse. The Court "may accede" to the application, not "must." In

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Armorduct Manufacturing Co. v. *General Incandescent Co.* (1) the plaintiffs, who had obtained judgment against the company, were led by the company's solicitor to believe that a cheque would be sent in a few days, and in consequence delayed issuing execution, but were not informed that a meeting of the company had been convened for the purpose of passing a winding-up resolution. Before execution was issued the winding-up resolution was passed, and it was held that as the postponement of the execution had been caused by a trick on the part of the company the Court ought not to stay it. In the present case the judge exercised his discretion in favour of allowing the execution to proceed, and with that exercise of discretion this Court will not interfere. But if it is necessary to show special circumstances to justify the refusal of the stay those circumstances exist here. The 4150*l.* which it is sought to attach under the garnishee order, is really the money of the judgment creditors. The only reason why Barber & Co. were entitled to recover that money from Barclays Bank was because they owed it to the Anglo-Baltic. Apart from that liability to the Anglo-Baltic the fund would never have come into existence. Under those circumstances it can hardly be that Barber & Co., whose only title to the money is derived from their liability over, should be allowed to keep it. It would seem strange that the creditors of the company should be permitted to derive a benefit from the fact that the company owed money to somebody else, and that the larger the sum the company owed the greater that benefit should be. No doubt the right of Barber & Co. against Barclays was not, strictly speaking, a right of indemnity, for there was no contract to indemnify. It was a right to maintain an action for damages. But in this particular case there would be no substantial difference between the two. The measure of the damages in that action would be the exact amount of the bills, and the principle which would have been applicable if there had been a contract of indemnity must equally be applicable to the facts of this case. What that principle is

(1) [1911] 2 K. B. 143.

appears from *In re Richardson*. (1) There a lessee was trustee of the leasehold premises for his wife, who as beneficial owner was liable in equity to indemnify him against any claim by the landlord under the covenants. On the expiration of the lease the landlord obtained judgment against the lessee for breach of covenant, and the lessee became bankrupt. The landlord obtained leave to bring an action in the joint names of himself and the trustee in bankruptcy to recover the amount of the judgment from the wife under the lessee's right of indemnity. It was held that the trustee in bankruptcy could only avail himself of the right of indemnity for the purpose of passing on the money recovered to the principal creditor, and that the landlord was entitled to it. Cozens-Hardy M.R. (2) said: "The respondent says, 'This right to an indemnity which the bankrupt as trustee had against his cestui que trust is property which vests in me as his trustee in bankruptcy and I am bound to apply that like all other assets of the bankrupt for the benefit of all the creditors.' But is that quite so? I cannot think it is. If and when he pays the amount of the debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify, as part of the estate, but unless and until he pays I fail to see how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate." And Fletcher Moulton L.J. said (3): "The case may be stated simply in this way. Suppose A. has a claim upon B., but in respect of that claim B. has a right of indemnity from C. B. goes bankrupt. Is B.'s trustee in bankruptcy in a position in which he can force C. to pay the amount of the claim to him and then can use the money so obtained for distribution amongst the creditors generally, whereas he only pays a dividend upon the claim which A. has against the bankrupt?" and he answers that question in the negative. That exactly

(1) [1911] 2 K. B. 705. (2) Ibid. 711.
(3) Ibid. 712.

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covers the present case. *In re Richardson* (1) was discussed in *Liverpool Mortgage Insurance Co.'s Case* (2), but it was unnecessary to question the decision, for that was a very different case. There a company issued debentures, payment of which was guaranteed by a guarantee society. The society entered into a contract with an insurance company by which the latter insured two-elevenths of the society's risk under their guarantee. The company made default in payment of the debentures, and thereupon the society became liable to the debenture holders under the guarantee. The society shortly afterwards went into liquidation. The debenture-holders' securities were realized, and after distribution of the proceeds there remained a deficiency due to them. It was held that the contract between the society and the insurance company was a contract not of suretyship but of insurance, and that the insurers were liable to pay the liquidator of the society two-elevenths of the deficiency, and not merely two-elevenths of the dividend payable by the society on that deficiency; but that even if the contract was one of indemnity the amount payable by the insurers would still be the same, for they ought not to derive an advantage from the fact that their assured had become insolvent. That case dealt only with the amount to be recovered, and not, as in *In re Richardson* (1) and in the present case, with the parties to whom the money would belong when recovered. In any view the money recovered from Barclays Bank would in the hands of Barber & Co.'s creditors be a windfall to which they could have no moral title, and that is a fact which the Court should take into consideration when exercising its discretion.

[The appellants' counsel were not called on to reply.]

SCRUTTON L.J. In this case the defendants, Messrs. Barber & Co., had a manager named Tremain, who fraudulently put his employers' name to a large number of bills of exchange for which they received no consideration. Two of those bills, amounting together to 24,000*l.*, had been

(1) [1911] 2 K. B. 705. (2) [1914] 2 Ch. 617.

discounted by the Anglo-Baltic and Mediterranean Bank, who sued Barber & Co. upon them. While that action was proceeding, on March 8, 1921, Barber & Co. went into voluntary liquidation. The effect of that was that by s. 186 of the Companies Act the assets of the company became divisible equally among the creditors pari passu, and the result of that statutory provision has been that the powers of the Court to stay actions against a company in compulsory liquidation have been extended in practice to companies in voluntary liquidation, and it is now the almost invariable practice when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors pari passu, the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors. The liquidation of Barber & Co. having taken place with this action pending the liquidator considered the question of defending it, and eventually on July 28, 1921, he submitted to judgment for the amount claimed. The next thing that happened was that Barber & Co., who had been compelled to pay to the holders at maturity a number of other bills, amounting to 32,500*l.*, which Tremain had fraudulently accepted in their name without their authority, brought an action against Barclays Bank to recover the amounts of both sets of bills. The nature of the claim against Barclays Bank was that Tremain had an account with that bank, and that the manager of the bank, with knowledge of Tremain's fraud, procured him to pay the proceeds of the bills into that account for the benefit of the bank, or at all events did so negligently in that, knowing him to be the manager of Barber & Co., he received the money and credited it to Tremain's account without making any inquiry of Tremain's employers as to the extent of his authority to deal with the proceeds of the bills which bore their name. That action proceeded for a considerable time, and ultimately on March 25, 1924, an agreement was come to by which the action was settled on the terms of Barclays Bank, whilst denying liability, paying

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the sum of 9730*l.*, and Barber & Co. withdrawing all charges of fraud and negligence against Barclays Bank and their manager. Thereupon the Anglo-Baltic Bank, having an unsatisfied judgment against Barber & Co., obtained a garnishee order nisi attaching the money payable by Barclays Bank under the settlement. Of course garnishee proceedings are only a form of execution of a judgment, so when the liquidator received notice of that order he applied for a stay of execution of the judgment, that is of the garnishee order, under the general jurisdiction of the Court to stay the enforcement of a judgment against a company in voluntary liquidation. The Master ordered the execution to be stayed, and discharged the garnishee order. On appeal Swift J. reversed the Master's order. The liquidator has appealed to this Court. Now it is said that the Court is not obliged to stay execution where the defendant company is in voluntary liquidation, but has a discretion to allow the execution to proceed, and that, the order of Swift J. having been made in the exercise of that discretion, this Court will not interfere. In support of that proposition *Armorduct Manufacturing Co.* v. *General Incandescent Co.* (1) was cited. But that case turned on very exceptional facts. The judgment creditor there, if he had been left alone, would have obtained execution of his judgment, but was induced by a false pretext on the part of the company to postpone the execution, and then the company, taking advantage of that postponement, went into voluntary liquidation, and asked the Court to stay execution of the judgment because they were being wound up. Under those circumstances the Court felt justified in allowing the execution to proceed. But it is only in very special circumstances such as those that the Court will depart from its general practice of staying execution when the company is in voluntary liquidation, for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets pari passu. Then are there any special facts in the present case which would justify the Court in departing from the almost universal rule? It is

(1) [1912] 2 K. B. 143.

said that, the Anglo-Baltic Bank having got judgment against Barber & Co. on certain bills, Barclays Bank are under an obligation to indemnify Barber & Co. against that liability, and that the money payable by Barclays Bank is in some way earmarked to satisfy the Anglo-Baltic Bank's claim under that indemnity. I am quite unable to see any foundation for that contention. The claim by Barber & Co. against Barclays Bank was for damages for fraud and negligence. How such damages when recovered can belong to the Anglo-Baltic Bank I am unable to understand. It was suggested that the plaintiffs' contention was only an application of the principle stated by the Court of Appeal in *In re Richardson.* (1) I had occasion to consider the meaning of that decision when sitting in the Court of Appeal in *Liverpool Mortgage Insurance Co.'s Case* (2), and expressed the opinion that it turned on very special and peculiar facts, and was not intended by Cozens-Hardy M.R. to lay down any rule of general application. I also pointed out (3) that the very general statements as to the common law right of indemnity made by Fletcher Moulton L.J. were inconsistent with the rules laid down by the Court of Appeal in *Ashdown* v. *Ingamells.* (4) Where a plaintiff sues a defendant in contract, and the result of his recovering judgment is to give the defendant a claim in damages against somebody else, there is no legal or equitable principle that I can see on which the plaintiff can be entitled to claim those damages. The result in this case is that the damages recoverable by the liquidator under the agreement of compromise with Barclays Bank must be divided rateably among the company's creditors, and the Master's order staying the proceedings under the garnishee order must be restored.

ATKIN L.J. I agree. It appears to me that the Master's order in this case gave effect to the well-established practice in voluntary winding up not to permit a creditor after the commencement of the winding up to issue execution against the property of the company. There are exceptions to that

(1) [1911] 2 K. B. 705.
(2) [1914] 2 Ch. 617.
(3) [1914] 2 Ch. 651.
(4) (1880) 5 Ex. D. 280.

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general rule, as for instance where the judgment creditor has been induced to postpone the execution until after the winding-up resolution by some fraud or sharp practice on the part of the company; but with that exception, and possibly some others, the rule of practice is well settled. It is founded on the principle expressed in s. 186 of the Companies Act that upon a voluntary winding up the property of the company is to be applied in satisfaction of its liabilities pari passu, a principle which is obviously violated if a creditor of the company is entitled to seize the company's assets for the purpose of paying its debt to him. The only ground on which leave to issue execution in this case could be justified would be on the supposition that the judgment creditor had some right in equity over the debt which he seeks to take in execution under the garnishee proceedings. Upon that all I can say is that I share with my brother the difficulty of seeing any conceivable right, either in law or equity, that the judgment creditor can have to that money. The judgment debtors Barber & Co. had incurred liability on certain bills to the Anglo-Baltic Bank, and also on certain other bills to other parties, which latter liability they had already satisfied by payment, and they claimed as against Barclays Bank that their liability in respect of both sets of bills was brought about by the fraud or negligence of the bank's manager, for which the bank was responsible. That claim was compromised by Barclays Bank agreeing to pay a sum of 9730*l.*, to cover the claim both in respect of the bills on which Barber & Co. were indebted to the Anglo-Baltic, and also those which they had already paid to the other parties. As regarded their right to attach any portion of that sum the judgment creditors drew a distinction between the garnishees' liabilities on the two sets of bills, and, while admitting that they had no right to attach the portion referable to the bills which Barber & Co. had paid to the third parties, limited their claim under the garnishee order to 4150*l.*, being the portion referable to the bills on which Barber & Co. were liable to them. But that distinction does not seem to me to affect the position. The judgment creditors have in my opinion

no more title to one portion of the money payable by Barclays Bank than they have to the other, and *In re Richardson* (1), where the bankrupt's right was to an indemnity and not to compensation in damages, appears to me to afford no support to any contention to the contrary. The appeal must be allowed, and the order of the Master restored.

Appeal allowed.

Solicitors for the appellants: *Metcalfe, Hussey & Hulbert.*
Solicitors for the respondents: *Nicholson, Graham & Jones.*

J. F. C.

WHELAN (INSPECTOR OF TAXES) *v.* HENNING.

1924
June 25; *July* 2.

Revenue—Income Tax—Foreign Possessions—Source of Income—Assessment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., r.* 1.

The respondent owned shares in a company incorporated outside the United Kingdom. For the years 1918, 1919, and 1920, the company declared dividends, and the amounts thereof due in respect of the respondent's shares were remitted to him in this country. For the year 1920 no dividend was declared, but the respondent was assessed to income tax for the year ending April 5, 1921, under Sch. D, Case V., in the sum of 3424*l.*, being the average dividend received by him for the three preceding years:—

Held, that the respondent's liability depended not, as the Crown contended, upon the possession of shares in the year of assessment, but upon the receipt of some profit therefrom in that year.

Brown v. *National Provident Institution* [1921] 2 A. C. 222 discussed and applied.

CASE stated under the Income Tax Act, 1918, s. 149, by Commissioners for General Purposes of the Income Tax Acts for the Division of Dorchester.

The facts and arguments as appearing from the case stated were as follows:—

At a meeting of the Commissioners held at Dorchester, on February 10, 1922, the respondent, Captain R. H. Henning, appealed against an assessment to income tax in the sum of 3424*l.* for the year ending April 5, 1921, made upon him in respect of income arising from shares out of the United

(1) [1911] 2 K. B. 705.

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Kingdom, under the provisions of Sch. D of the Income Tax Act, 1918, Case V.

The respondent was a person residing in the United Kingdom, and was the holder of shares in the Vincit Tea and Rubber Co., Ld. The company was incorporated in Ceylon, having an issued capital of 3300 shares of Rs.100 each fully paid. The respondent was the holder of 1000 of these shares; he was not a director of the company. The whole of the dividends declared on the respondent's holding had been remitted to this country. Up to and including the year ended April 5, 1920, the respondent had been assessed under Case V., Sch. D, r. 1, on the basis of the full amount thereof on an average of the three preceding years (as directed in Case I.), except in the earlier years before a three years' average was obtainable, when the assessment was determined under r. 1 of the rules applicable to Cases I. and II., Sch. D (i.e., in the first and second years on the actual amount declared in the first year; in the third year on the average of the first and second years). The respondent had no other income from foreign possessions assessable under Case V. The whole of the dividends declared having been remitted to this country, no question arose under Case V., r. 1, in respect of dividends declared but not remitted. The dividends had been converted from rupees into sterling, and the actual amount of sterling received had been brought into account. A return was made on July 22, 1920, in the sum of 3424*l.*, being the average of the amounts received in the three preceding years, but the respondent had since filed an amended return showing no income under Sch. D. For the year ended April 5, 1921, an assessment was made upon the respondent by the Commissioners in the sum of 3424*l.*, arrived at as follows :—

	Dividend declared.	Dividend received.
Year ending April 5, 1918	.. Rs.33,000	.. 3730*l.*
,, ,, April 5, 1919	.. Rs.35,000	.. 2629*l.*
,, ,, April 5, 1920	.. Rs.53,000	.. 3914*l.*
		10,273*l.*

Average of the three preceding years :—3424*l.*

In the year 1920 the company made a net profit of Rs.4820, but no dividend was declared, the amount being carried forward, and consequently no income was remitted to the respondent during the tax year ended April 5, 1921.

It was contended on behalf of the respondent: (*a*) that Case V., r. 1, merely provides certain principles by which income has to be measured for the purposes of taxation, but that before the respondent could be taxed there must be a taxable income; (*b*) that the computation of tax is governed by the charging section under Sch. D, cl. 1, which provides as follows:—"Tax under this Schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing—(i.) to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere," and that therefore the tax is only leviable on income; (*c*) that in the case of *Brown* (*Surveyor of Taxes*) v. *National Provident Institution* (1), Viscount Haldane held that "the expression 'income tax' as used by the Legislature, was a generic description of the tax which was levied under all the schedules alike, and it was not meant to be anything but a tax on income," also that "the true meaning of the words the Legislature has used is that the tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year," and that "the natural construction of the language of the Third Case of Sch. D appears to me to be that the tax is imposed only where there are profits and gains arising within the year of assessment, but that the amount payable is to be measured by reference only to the profits and gains arising within the preceding year"; (*d*) that in the same case it was laid down by Lord Atkinson (1) "that income tax is primarily a tax upon a real, and not an imaginary, income accruing to the taxpayer during the year of assessment," and "that if in the year of assessment a source of income should dry up and no income accrue, then no tax

(1) [1921] 2 A. C. 222, 233, 236, 237, 243, 246, 247.

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could be levied or collected in respect of a non-existing income," and further that the average of three years as provided for in r. 1 merely fixes the lower limit of income to be taxed, and it is a measure "to be applied not, however, to a vacuum, or to a non-existing thing, but to an existing thing, the amount of the profits and gains actually arising or accruing to the taxpayer within the year of assessment," whilst the provisions of the Income Tax Act, 1853, clearly indicate that if no profits or gains arise or accrue from one of the named sources to the person entitled during the year of assessment that person cannot be made liable to pay any income tax in respect of that source; (*e*) that in the same case Lord Sumner held that in a year when there is no profit the method of computation could not apply, as it becomes a calculation of a sum to be paid on nothing, which meant not to be paid at all; (*f*) that in the case of *Tennant* v. *Smith* (1) Lord Macnaghten ruled that "the duty under Schedules D and E is payable on the 'annual amount.' It is a tax on income in the proper sense of the word. It is a tax on what 'comes in'—on actual receipts." In the case of *London County Council* v. *Attorney-General* (2) the same learned judge observed as follows: "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else"; and later: "In every case the tax is a tax on income, whatever may be the standard by which the income is measured"; (*g*) that had the respondent received any income at all, however small, during the year of assessment, the assessment was in order; (*h*) that the source of the respondent's income is not the holding of shares, but the amount which by resolution of the company is divided amongst the shareholders, and that, following the dictum of Lord Atkinson, as no income had arisen from such source or had been received by the respondent during the year of assessment the respondent could not be made liable to pay income tax in respect of the source; (*i*) that the average income of the three preceding years cannot be deemed to be an income which in fact never existed.

(1) [1892] A. C. 150, 164. (2) [1901] A. C. 26, 35.

It was contended by the appellant on behalf of the Crown (inter alia): (*a*) that the source of income is the holding of shares in the company by the respondent and that the declaration of a dividend on such shares does not constitute the source; (*b*) that the charging section under which the respondent is liable is Sch. D, cl. 1 (*a*) (i.) and under Case V.; (*c*) that the rules applicable to Case V. are to be read in conjunction with the rule applicable to Case I., and that the principles of taxation which apply to one Schedule equally apply to another, as laid down in the case of *London County Council* v. *Attorney-General* (1), where it was held "that the Income Tax Acts of 1842 and 1853 . . . . do no more than impose a single tax on profits and gains brought into charge by the Income Tax Acts. There is no special or peculiar tax under each Case of Sch. D and the other Schedules or their branches, whatever be the idiosyncrasies of the methods prescribed for collection," see judgment of Lord Haldane in *Brown* v. *National Provident Institution* (2); (*d*) that in support of this contention liability to assessment depends on the existence of the source of income in the year of assessment—i.e., the charging section of Sch. A provides that the tax under such Schedule shall be charged in respect of the property in all lands, etc., in the United Kingdom, and that once the existence of the property is established such property constitutes the source and it is liable to be assessed; similarly the charging section of Sch. B provides that tax under such Schedule shall be charged in respect of the occupation of all lands, etc., in the United Kingdom, and that once the occupation is established it constitutes the source of profit and is liable to be assessed, whilst the charging section of Sch. E provides that tax under such Schedule shall be charged in respect of every public office or employment of profit, etc., and that once the existence of the office or employment is established it constitutes the source of income and is liable to be assessed; (*e*) that Case V. of Sch. D has to be considered in conjunction with Cases I. and II., and that once the existence of the

(1) [1901] A. C. 26, 35. (2) [1921] 2 A. C. 222, 233, 235, 240, 243.

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trade profession employment or vocation is shown it is caught by the rules applicable to these cases and liable to be assessed, and that the introduction of the word "income" in Case V. does not affect the principle, that the source of income when once established gives rise to an assessment, and that following these lines it is the practice to assess a continuing business on the average profits of the three preceding years, even though during the year of assessment no profits or income may have been derived therefrom; (*f*) that the Income Tax Act, 1918, s. 34, provides for relief in case a person sustains loss, and that if the contention of the respondent is correct such section has no meaning or application; (*g*) that the case of *Brown* v. *National Provident Institution* (1) is distinguishable from the present case, inasmuch as in the former case the source of income has ceased to exist, and laid stress on the fact that Lord Haldane in his judgment ruled that "the question is whether the source of such profits and gains must be one which continued to exist in the year of assessment"; and later: "It is to be observed, that speaking broadly at all events, the general principle of the Acts is to make the tax apply only to a source of income existing in the year of assessment," whilst Viscount Cave (who dissented from the ruling of the other Law Lords) expressed the opinion that "the Legislature has regarded the taxpayer himself as the only source of profit which need exist in the year of assessment." Lord Atkinson in giving judgment said: "It ignores the vital fact that income tax is primarily a tax upon a real, not an imaginary, income accruing to the taxpayer during the year of assessment." From this the inspector of taxes contended that a loss in trade is not imaginary income, and drew attention to the remarks of Warrington L.J. in the Court of Appeal in *National Provident Institution* v. *Brown* (2): "Now it is common ground that in general, according to the scheme of the Income Tax Acts the tax is payable in respect of a source of income existing in the year of assessment, and that the profits of the preceding

(1) [1921] 2 A. C. 222, 233, 235, 240, 243. (2) [1920] 3 K. B. 35, 56.

year, or the average of the profits of several preceding years, are respectively used merely as a measure for the purpose of taxation of the amount of the profits in the year of assessment"; (*h*) that the word "profit" must be taken in a very broad sense and that for income tax purposes it includes a "loss."

In reply the respondent contended that the Income Tax Act, 1918, s. 34, applied only to a loss on any trade profession employment or vocation or in the occupation of lands and was not applicable to "income" under Case V.

The Commissioners, having considered the facts and contentions herein set forth, were of opinion that the respondent was not liable to be assessed on the average of the three preceding years. They thereupon allowed the appeal and discharged the assessment. At the request of the appellant the Commissioners stated this case for the opinion of the Court.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the appellant.

The *respondent* in person.

The arguments used sufficiently appear in the case stated and in the judgment.

Cur. adv. vult.

July 2. ROWLATT J. read the following judgment: In this case the respondent was possessed of shares in a company outside the United Kingdom income from which is taxable under Case V. as profits or gains from a foreign possession. In the year of assessment (1920–1921) there was no such income, though there had been in the three previous years. He was, however, assessed in the sum of 3424*l.*, being the average of the three preceding years. On appeal the Commissioners discharged that assessment, stating the case which is now before me. The question is whether the respondent's liability depends, as the Crown contends, upon the possession of the shares in the year of assessment or, as the respondent contends and the Commissioners decided, upon the receipt of some profit therefrom in that year. The

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answer to that question depends upon the true interpretation of the decision of the House of Lords in *Brown* v. *National Provident Institution*. (1)

The respondent unfortunately was unprovided with counsel to argue his case before me, but I have a full statement of the contentions of his counsel before the Commissioners. His position in view of the decision to which I have referred is that when it is enacted in Sch. D, cl. 1, that tax under that Schedule "shall be charged in respect of (*a*) the annual profits or gains arising or accruing" from the sources there mentioned (in this case a foreign possession) the subject matter of the tax is not the source of possible profits or gains, but the profits or gains themselves, and therefore the liability to taxation depends not upon the existence of such a source but upon the existence of profits or gains. This is a very clear proposition, in support of which numerous passages in the judgments delivered in the Court of Appeal and in the speeches in the House of Lords were quoted to the Commissioners. The Attorney-General, however, contended that nevertheless the decision was based on the absence of a source of profits or gains and not on the absence of profits or gains themselves. He pointed out that returns for income tax are made early in the financial year, that the assessments are made during the summer and autumn, and that the tax is unworkable if liability depends upon the accrual of profits in the year which at the date of assessment is still incomplete and at the time for returns is only beginning. This, however, was an argument for the Crown as applicable in the case referred to as in the present case, and Lord Cave refers to it in his dissenting opinion. It did not prevail.

It seems to me, looking at the matter now in the light of the decision in question, that the reason why I went wrong when the case came before me was precisely this, that I approached the question from the point of view that the Attorney-General now again propounds. The Acts themselves say nothing about the existence or non-existence of sources. But the returns and assessments are made in

(1) [1921] 2 A. C. 222.

advance. The measure of the amount is to be found in the result of previous years or their average. How then is it to be decided whether or not a return and assessment are to be made for the current year? The question in nine cases out of ten arises under Case I. or Case II. in respect of trades or professions, and it became a commonplace among those dealing with income tax that if the trade or profession had been discontinued (a matter determinable at the beginning of the year) the liability to make a return and be assessed ceased. From this arose the notion that the cessation of liability to tax depended on the disappearance of the source of possible profits or gains as opposed to the disappearance of the profits or gains themselves, which of course necessarily also happened when the source disappeared. The test came when the question of profits from discounts arose. These do not appear to possess a source having an independent existence in the way that a trade, vocation or property have an existence, independent of the profits they may or may not produce, which can be seen at the beginning of the year. To speak of discounts as the source of profits is not to speak of a thing which may cease or continue, but is merely to describe the profits. Under these circumstances the supposed principle that liability depended upon the existence of a source seemed to have no application, and that was the basis of my decision. I think the decision of the House of Lords has displaced the whole of this and has declared that liability depends on the existence not of sources apart from profits, but of profits, which are merely classified for measurement according to the sources named in the Schedules. Lord Haldane says in *Brown's Case* (1): "The tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year," and again: "The tax is imposed only where there are profits and gains arising within the year of assessment." This seems to me quite definite and precise, but the elaborate opinion of Lord Atkinson places the matter, in my judgment, beyond any doubt at all. He says

(1) [1921] 2 A. C. 222, 236, 237, 243, 244, 246.

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that the contention of the Crown "ignores the vital fact that income tax is primarily a tax upon a real, not an imaginary, income accruing to the taxpayer during the year of assessment." It can only be supported, he says, "by confounding the different measures which the statutes provide for ascertaining the amount of the taxable income of a taxpayer with the thing to be measured, the income itself." "The Solicitor-General," he says, "frankly admitted on behalf of the appellant that no case could be found in the books deciding that a taxpayer to whom no profits or gains accrued from a given source during the year of assessment, could be treated as having received profits and gains from that same source not less in amount than those he received from it in the immediately preceding year." With that encouragement the Attorney-General asks me to provide such a precedent in this case. "The appellant," says Lord Atkinson (1), "seeks to substitute the income of the previous year for the cypher which represents the actual income of the subsequent year."

The above extracts are taken from the preliminary remarks in Lord Atkinson's speech. He proceeds to a detailed examination of the tax and its history. Taking first the Act of 1799, in which there was no measure provided and no classification by Schedules, Lord Atkinson points out that it is clear that the taxpayer was each year obliged to pay the duty on income he received or was entitled to receive during that year. Proceeding to the Act of 1803, which introduced the Schedules but provided no measure, Lord Atkinson says this (1): "From this legislation one sees clearly what was the true nature of income tax. It was a single tax divided into different parts merely for the convenience of collection. It was a tax assessed, levied, and collected yearly on the profits and gains arising and accruing during the year in which it was collected from one or more of the sources named. If this be so, as in my opinion it clearly is, it necessarily follows that if in the year of assessment a source of income should dry up and no income accrue, then no tax could be levied or collected in respect of a non-existing income."

(1) [1921] 2 A. C. 222, 236, 237, 243, 244, 246.

Lord Atkinson then proceeds to the Act of 1842, which is practically identical with that of 1806. He deals specifically with the first case of Sch. D (trade, etc.). Speaking of the measure to be observed under that case, he says it is "a measure to be applied not to a vacuum or to a non-existing thing, but to an existing thing, the amount of the profits and gains actually arising or accruing to the taxpayer within the year of assessment." Pausing here, I recall that it was most strenuously contended by the Attorney-General before me in the present case that it was impossible that in the case of traders the liability to assessment in the course of the year, and the obligation to make a return at the beginning, could depend upon the existence of profits in that year. But it seems to me that Lord Atkinson expressly says that it does. Proceeding to refer to the Fourth Case he again lays it down that if the source of income dries up and nothing is received in Great Britain no tax can be levied, and as to Case V. (the one now before me) he says the income is again to be measured by the three years' average, and the remarks already made by him as to Case I. apply to it. Lastly, after referring to the Act of 1853, Lord Atkinson sums up the position as follows (1): "It would appear to me that these provisions clearly indicate that if no profits or gains arise or accrue from one of the named sources to the person entitled, during the year in which the duties are to be 'charged, raised, levied, collected and paid,' i.e., the year of assessment, that person cannot be made liable to pay any income tax in respect of that source."

It was not suggested that the Consolidating Act of 1918 has made any difference as regards the question under discussion, and it seems to me that this appeal must clearly be dismissed with such costs, if any, as are incurred by a respondent in person in such a proceeding as this.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) [1921] 2 A. C. 222, 250.

F. P. F.

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June 30 ;
July 1, 14.

BACK (INSPECTOR OF TAXES) *v.* DANIELS.

Revenue—Income Tax—Occupation of Lands—Special Agreement for the Hire of Lands to grow Potatoes on—Potato Growers also Potato Merchants and Salesmen—Assessment of Profits of growing Potatoes under Sch. B or D—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. B, Sch. D.*

The respondents, who were wholesale potato merchants and potato salesmen carrying on business in London, owned land on which they grew potatoes, and also hired land under ordinary tenancy agreements for the same purpose. They also grew potatoes on land in Lincolnshire which they hired from neighbouring farmers under special agreements, the lands so hired being changed each season. Under those special agreements, by which the land was purported to be let to the respondents, the respondents had possession of the land until the potatoes were fully ripe, which in some cases was more than a year from the date of the agreement and in others was less than a year. The landlord under the agreement had to plough the land, do all the carting and provide all the horse labour that was necessary. The respondents supplied all the seed, artificial manure, and the manual labour necessary to drill the manure, plant the seed, take up and pit the potatoes and afterwards prepare them for market. The landlord was paid 3*l.* per acre as rent for the land, and 45*l.* per acre for supplying all horse labour, etc., which sum also included all rates and taxes. The landlord was, and the respondents were not, assessed to income tax under Sch. B in respect of those lands. The respondents sold the potatoes, which they had grown in the course of their business as potato salesmen. They were assessed in London to income tax under Sch. D on the profits of their business as potato merchants and salesmen, and the profits they made from the sale of potatoes grown on the lands under those special agreements were included in that assessment :—

Held, that the respondents were in occupation of the lands on which they grew potatoes under the special agreements, and were assessable in respect of the profits arising therefrom under Sch. B and not under Sch. D. The fact that the respondents were wholesale potato merchants and salesmen and in the course of that business sold the potatoes they had grown did not render them liable to be assessed to income tax under Sch. D in respect of the profits made by growing potatoes on the basis that the growing of potatoes was ancillary to their business of potato merchants and salesmen.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners held on November 3, 1922, for the purpose of hearing appeals, L. V. Daniels and P. L. Daniels, trading as Joseph S. Daniels (hereinafter

called the respondents), appealed against an assessment to income tax under Sch. D in the sum of 9632*l.* for the year ending April 5, 1922, made upon them by the Additional Commissioners for the Tower Division of the County of Middlesex under the provisions of the Income Tax Acts in respect of the profits of the business of wholesale potato merchants, fruit and vegetable salesmen and potato growers carried on by the respondents at 107 Commercial Street, London.

2. The respondents grew potatoes upon lands which they both owned and occupied and also upon lands which they occupied under ordinary tenancy agreements. The profits of the occupation of those lands were not included in the Sch. D assessment which was the subject of this case, and with regard to those lands no question for the Court arose.

3. In addition to growing potatoes on the lands mentioned in the preceding paragraph the respondents grew potatoes on lands which they hired from neighbouring farmers at Holbeach in Lincolnshire and elsewhere under special agreements in the form mentioned in para. 5 hereof. This appeal related only to potatoes grown on lands hired by the respondents under these special agreements. The profits derived by the respondents from potatoes grown on these lands were included in the assessment under Sch. D appealed against, and the only question for the opinion of the Court was whether those profits had been rightly included in the Sch. D assessment.

4. The potatoes grown on the lands referred to in the preceding paragraph together with the other produce of the respondents were sent to London and sold by the respondents at 107 Commercial Street in London.

5. The Memorandum of Agreement which follows was admitted to be typical of the agreements referred to in para. 3 above.

"Memorandum of Agreement made October 11, 1921, between H. P. Carter of Abbots' Manor, Holbeach, in the county of Lincolnshire, ... hereinafter called the landlord, of the one part, and P. L. Daniels and L. V. Daniels (trading

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as Joseph S. Daniels) of Spitalfields Market, London, E. and other places, farmers and potato merchants, hereinafter called the tenants, of the other part, whereby the landlord has agreed to let and the tenants have agreed to take the one in consideration of the agreement of the other subject to survey eight fields consisting of 157 acres or thereabouts of land exclusive of headlands known as [describing them] now in the occupation of the said landlord upon terms and conditions following that is to say :—

" (1.) The tenants shall have possession of the said land for the purpose of growing potatoes from the date of this agreement until the potatoes are fully ripe and in fit condition to be stored in pits and in addition to possession of so much thereof or of other equally convenient land to be submitted therefor with the consent in writing of the said tenants as shall be required for pitting their seed and storing their crop in pits until such time as the said crop is sold and removed in the ordinary course of trade.

" (2.) The tenants shall at their own cost and expense provide all necessary seed and shall also at their own cost supply 12 cwts. of the usual artificial potato manure to each acre.

" (3.) The tenants shall at their own cost and expense supply all the manual labour (except such as is usually performed by the horsemen and waggoners) necessary to drill the manure and plant the seed mentioned in cl. 2 hereof and take up and pit the potatoes and afterwards riddle, sort, clean and otherwise prepare the same for market.

" (4.) The landlord shall at his own cost and expense plough ten inches deep, and when requested well and sufficiently cultivate and work the said land and make the rows, cart the manure and seed from the nearest station or landing place on to the land and provide all horse labour (except such as is to be provided by the said tenants under the provisions of cl. 3) that is necessary and required for drilling manure, properly covering the potatoes in the rows, and for the successful production and careful scuffling, moulding, spraying and ploughing up the crop and harrowing

and cross harrowing according to the custom of the country around and carting to the pits pitting and delivery on rail of the same to the satisfaction of the tenants or their agents.

"(5.) The landlord shall deliver the potatoes on rail at Holbeach or Fleet Stations at such times and in such quantities as the tenants shall require them, and shall for such purpose provide sufficient men, horses, carts, straw and sheets to load and convey the potatoes to the station, properly protected from damage by frost and weather or otherwise, and unload the same into trucks, and shall also provide sufficient dry wheat straw and cover therewith the ends sides and the top of each truckload of the potatoes so as to effectually protect the same from damage by frost and weather or otherwise in transit.

"(6.) The landlord shall supply the tenants free of charge with an ample quantity of dry wheat straw to safely and efficiently cover the seed and the whole of the crop in pits and to effectually protect the same from damage by frost and weather or otherwise.

"(7.) The landlord hereby undertakes and agrees to supply and carefully spread on the said land all the good rotten crewyard dung possible.

"(8.) The landlord hereby undertakes and agrees to occupy the said land until the said crop of potatoes shall have been cleared off the land and will in the meantime pay all rent, rates, taxes, charges and assessments that may be due from him in respect of his holding and also in no way suffer the said crop of potatoes to be distrained upon or to be taken or levied in execution.

"(9.) The landlord shall procure the consent of the superior landlord to this agreement if by the terms of his tenancy such consent is necessary.

"(10.) The tenants shall pay as and for rent of the said land the sum of 3*l.* per measured acre, and in consideration of the landlord supplying all horse labour and men to work the horses and other manual labour as mentioned in the preceding clauses to be executed by the landlord, the sum

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of 15*l.* per measured acre, top and bottom headlands not to be planted or measured in the acreage, which sum shall include all rates and taxes, parochial and Parliamentary, levied or hereafter to be levied. Payments to be made as follows :—End of September, 1922, 500*l.* ; end of October, 1922, 500*l.* ; end of December, 1922, 500*l.* ; end of January, 1923, 500*l.* ; end of February, 1923, 500*l.* Balance end of March, 1923, but it is hereby agreed that should the tenants clear a larger acreage of land than is covered by the several instalments for payment as they become due, then the several instalments are to be accelerated in proportion to the land cleared.

"In witness whereof the said parties hereto have hereunto set their hands the day and year first hereinbefore written."

6. Land held under the agreements in question was given up to the farmer as soon as the crop was lifted and carted away, the time taken for the complete operation from the commencement of cultivation to the carrying of the crop varying with the kind of potatoes grown. In the case of early potatoes the respondents were usually in possession of the land for less than a year, in other cases for more than a year. To secure proper rotation of crops the same land was never utilized for the purpose of growing potatoes for the respondents for two years in succession. [A statement was included in the case which showed, in the case of potatoes planted in the spring of 1921, that the cultivation of the fields commenced in the beginning or middle of September, 1920, and that the fields were cleared, in the case of early potatoes, in the first week of July, 1921, in the case of second early potatoes, in the middle of September, 1921, in the case of late potatoes, in the middle of October, 1921.]

7. The farmers and not the respondents were the rated occupiers of the lands in question, and the farmers and not the respondents were assessed and charged to income tax under Sch. B in respect of the occupation of the lands.

8. Counsel for the respondents contended

(*a*) that the lettings under the special agreements in question were not lettings for a period less than a year ;

(*b*) that the respondents were in complete occupation of the lands in question;

(*c*) that the farmers were erroneously assessed under Sch. B in respect of the occupation of these lands, and that the fact that the farmers and not the respondents were actually assessed did not prejudice the respondents' case;

(*d*) that the fact that the farmers were assessed under Sch. B on twice the annual value showed that the lands had been treated as being occupied solely for the purpose of husbandry;

(*e*) that as the agreement provided for a payment to cover all rates and taxes, parochial and Parliamentary, it was immaterial whether the Sch. B assessments were made on the farmer or on the respondents, and that neither of the parties had objected to such assessments on those grounds;

(*f*) that the cases of *McKenna* v. *Herlihy* (1) and *Donald* v. *Inland Revenue Commissioners* (2) were not in point, as the lands in those cases were let for periods less than a year and the appellants were graziers deriving profits other than profits of husbandry from buying and selling cattle. Moreover in *Donald's Case* (2) the grazier only occupied the land from May to November;

(*g*) that the profits derived by the respondents from growing potatoes on these lands were not assessable under Sch. D.

9. The Inspector of Taxes on behalf of the Crown contended (inter alia)

(*a*) that the farmers and not the respondents were the occupiers of the lands;

(*b*) that the farmers had been properly assessed under Sch. B in respect of the occupation of the lands, and that the respondents were not so assessable;

(*c*) that the agreement did not amount to a demise of the land but was merely a contract for the purchase of potatoes by the respondents to be grown on lands of the farmers;

(1) (1920) 7 Tax Cas. 620.
(2) 1922 S. C. 237; 59 S. L. R. 246; 8 Tax Cas. 272.

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(*d*) that the profit arising to the respondents from the growing and sale of the said potatoes was a profit arising from their trade of wholesale potato merchants and was not a profit arising from the occupation of land;

(*e*) that the said assessment under Sch. D was correct and should be confirmed.

10. The Special Commissioners, having taken time to consider their decision, held that the respondents were the occupiers of the lands in question, and they reduced the assessment to 2577*l*.

There was a supplemental statement of facts signed by the respective solicitors from which the following paragraphs are taken:—

1. The lands referred to in para. 2 of the case comprised, in the years relevant to this appeal, two freehold farms and one leasehold farm situate at Ely. These three farms contained together an area of 450 acres and were known as "Littleport." The respondents also owned six acres of freehold land at Holbeach known as "Penny Hill," and in October, 1920, took on a fourteen years' lease a further 320 acres of land known as Coultons Farm also at Holbeach.

2. The lands hired by the respondents referred to in para. 3 of the case varied from year to year, and comprised portions of various farms at and near Holbeach. In most cases the portions hired by the respondents were not separately assessed to income tax under Sch. A and Sch. B of the Income Tax Act, 1918, but were included in the assessments of the respective farms of which they formed part, each farm being the unit of assessment. The lands so hired are hereinafter referred to as "the Holbeach lands."

3. The landlord, who was also the farmer of the respective farms hired by the respondents, ploughed and prepared the land, carted the manure and seed from the nearest station, delivered the crop on rail, and generally supplied all the horse labour. All the manual labour—namely, riddling the seed, planting, sowing artificial manure, scuffling, hoeing weeding, spraying and gathering, clamping and riddling for market was done by the respondents. The cost of this

manual labour to the respondents was for the year 1919 3675*l.* 11*s.* 8*d.*, and for the year 1920 6276*l.* 16*s.* 10*d.*

4. The respondents sold in London, as potato merchants and commission agents, farm produce grown by persons other than the respondents and also potatoes grown by the respondents on the Littleport Farms, and Coulton Farm, Penny Hill, and the Holbeach lands.

5. Separate accounts of the Littleport Farms, Coulton Farm, Penny Hill, and the Holbeach lands respectively were kept at Ely, and a separate account of the sales in London was kept at 107 Commercial Street, London.

6. The various books and data of the Littleport Farms, Coulton Farm, Penny Hill, and the Holbeach lands and of 107 Commercial Street, London, were submitted to the respondents' accountants, who prepared the final accounts from them. The assessment under appeal was based upon the accounts for the three years ended June 30, 1918, 1919 and 1920 (being the three years of average upon which the assessment, the subject of the case, was compiled) and the respondents' return for assessment to income tax for the year 1921-1922.

7. The accounts furnished to the Inspector of Taxes for the year ended June 30, 1918 (and years prior thereto), comprised a single profit and loss account, in which there were debited as expenses (inter alia) the price paid by the respondents for produce grown by other persons and purchased by the respondents for re-sale, rent of the farms leased by the respondents, rent paid for hire of the Holbeach lands, the cost of planting and growing potatoes on the said farms and Holbeach lands, and the general expenses incidental to the farms, the Holbeach lands, and 107 Commercial Street, London. The receipts credited to the account comprised the price received by the respondents from the sale of produce grown by and purchased from other persons as aforesaid, and of produce grown by the respondents on the said farms and Holbeach lands. In addition to this single account separate accounts were also kept of each of the said farms and of the Holbeach lands and of the operations at 107 Commercial

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Street. In the farm and Holbeach lands account a nett sum was credited as received from Commercial Street and this sum was the sale price less a commission taken by Commercial Street, and for this commission the Commercial Street account took credit. The accounts of Commercial Street so arrived at formed the basis adopted by the Special Commissioners for liability under Sch. D in this case.

8. (*a*) The accounts for the two years ended June 30, 1919 and 1920, respectively (and for years subsequent thereto) each comprised (inter alia) two profit and loss accounts headed "J. S. Daniels, 107 Commercial Street, E." (hereinafter called "the general account"), and "J. S. Daniels, Holbeach" (hereinafter called "the Holbeach account"), respectively.

(*b*) In the Holbeach account there were credited as receipts (inter alia) the price received by the respondents from the sale of potatoes grown by them on the Holbeach lands, and there were debited as expenses (inter alia) the cost of planting and growing the potatoes (including the payments to the farmers (or landlords) for the hire of Holbeach lands), and also the commission referred to in para. 8 (*d*) hereof.

(*c*) In the general account there were credited as receipts (inter alia) the price received by the respondents from the sale of produce grown by other persons as aforesaid and also the said commission hereinafter referred to. There were debited as expenses (inter alia) the price paid by the respondents for the purchase of produce grown by other persons as aforesaid and also the general expenses incidental to 107 Commercial Street, London.

(*d*) The Holbeach account was debited with commission on the sale of the potatoes grown on the Holbeach lands at the same rate as was charged by the respondents on produce sold for other growers or consignors, and this commission was credited to the general account.

(*e*) Similarly in the case of produce grown by the respondents on the Littleport Farms and Penny Hill and sold by them, the farm account was debited, and the general account was credited with commission at the same rate.

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This appeal related solely to the profits on the growing and sale of the potatoes grown on the Holbeach lands. In computing the profits of the respondents for assessment for Sch. D for 1921-1922 there were included the full amount of the profits shown in the Holbeach account. Upon appeal, the Special Commissioners reduced the said assessment by excluding therefrom the full amount of the Holbeach profits as aforesaid, and including the said commission on the sales of potatoes grown at Holbeach.

Sir Patrick Hastings A.-G., Sir H. H. Slesser S.-G. and *R. P. Hills* for the appellant. The respondents are not the occupiers of the lands which they hire from the neighbouring farmers under these special agreements for the purpose of growing potatoes, and therefore they are not assessable to income tax under Sch. B in respect thereof. They have no legal rights in respect of those lands; they merely traffic in what the occupier of the lands can give them. It does not necessarily follow from the fact that a person has the right to make a profit out of land that there is a demise of the land to him: see *Frank Warr & Co., Ld.* v. *London County Council* (1), where it was held that only a licence was conferred by an agreement to sell refreshments in a theatre and not an interest in lands. *McKenna* v. *Herlihy* (2) is very like the present case as regards the facts. In that case the appellants were breeders and buyers of cattle, and in addition to farming lands in respect of the occupation of which they were assessed under Sch. B, they rented land for grazing on what is known as the eleven months' system and for which tax under both Sch. A and Sch. B was assessed upon and paid by the owner. Appellants themselves were neither assessed under Sch. B nor rated to the poor for this land. Assessments were made upon them under Sch. D in respect of profits from grazing cattle thereon against which they appealed, and it was held that they were correctly charged under the Sixth Case of Sch. D. *Donald* v. *Inland Revenue Commissioners* (3) was a similar case where a farmer

(1) [1904] 1 K. B. 713. (2) 7 Tax Cas. 620.
(3) 1922 S. C. 237; 59 S. L. R. 246; 8 Tax Cas. 272.

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was held liable to be assessed to income tax under Sch. D in respect of the profits from the seasonal occupation of grazing land. An assessment to income tax under Sch. B is in respect of the profits or gains expectant to arise from the occupation of land for the purposes of husbandry in an amount equal to twice the annual value of the land. Twice the annual value of the land could not be considered to be the profits made by the respondents from growing potatoes thereon. Those profits were made by reason of the business which the respondents carried on as potato merchants, and according to the principle laid down in *Coman* v. *Rotunda Hospital, Dublin (Governors)* (1), those profits are assessable under Sch. D. If a man's main business is that of potato merchant and potato salesman and he grows his own potatoes in order to sell, as ancillary to his main business, he would be assessable to income tax under Sch. D on the profits which he makes from the growing and sale of the potatoes, deducting the assessment under Sch. B to which he would also be liable. The case of a farmer who in addition to farming sells his produce as an ancillary business is very different. It is necessary to see whether what is being done amounts to carrying on a trade or business under Sch. D. This is not a case of double taxation; the respondents have included a number of profits which ordinarily would be liable to assessment under Sch. D.

Latter K.C. and *Sir Stanford London* for the respondents. The proposition that because a man who carries on business as a potato salesman also grows potatoes, that therefore the business of growing potatoes must be regarded as part of the business of potato salesman and assessable under Sch. D is negatived by *Brown* v. *Watt.* (2) Molony C.J. pointed out in *McLaughlin* v. *Bailey* (3) that "Sch. B is confined to profits made in respect of the occupation of land, and in that category are included all profits which ordinarily and naturally flow from the occupation of land."

(1) [1921] 1 A. C. 1; 7 Tax Cas. 517.

(2) (1886) 13 R. 590; 2 Tax Cas. 143.

(3) [1920] 2 I. R. 310, 314; 7 Tax Cas. 508, 511.

Under the special agreements the respondents were the occupiers of the land they hired and they could be rated. It is an agreement by which the landlord agreed to let and the tenants agreed to take certain specified land, and the tenants are to have possession of the land for the purpose of growing the potatoes from the date of the agreement until the potatoes are fully ripe, therefore it is a demise of the land. The profits from the occupation of the land are taken by the respondents, who also take the risk of the crop. The farmer receives his money for the rent of the land and as payment for services rendered by him as a contractor quite apart from the occupation of the land. Where a licence is given to enter upon lands, if the exercise of the rights given by the licence involves a physical possession of the soil and the right is an exclusive right, then the licensee on entering becomes the occupier and is liable to be rated: see Ryde on Rating, 4th ed., pp. 56, 57; *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (1); *Kittow* v. *Liskeard Union.* (2) Sch. A, No. VII., r. 2, which, by r. 4 of Sch. B applies to Sch. B, provides that "every person having the use of any lands or tenements shall be deemed to be the occupier thereof." It is a question of fact whether the respondents had the use and occupation of this land, and the Special Commissioners were entitled to come to the decision they did on the facts. A farmer cannot realize his profits until he sells his produce. The fact that the respondents also carry on the business of potato merchants does not prevent them making a profit from growing potatoes as a farmer. They have had the risk of growing the crop and must sell in order to make a profit. *McKenna* v. *Herlihy* (3) was merely a case of agistment of cattle. The appellant in that case was not entitled to use the land as land, he could only take the herbage. The position of a grazing tenant was discussed in *O'Flaherty* v. *Kelly.* (4) *Donald* v. *Inland Revenue Commissioners* (5) is no authority.

(1) [1895] A. C. 117, 126, 132.
(2) (1874) L. R. 10 Q. B. 7.
(3) 7 Tax Cas. 620.
(4) [1909] 1 I. R. 223.
(5) 1922 S. C. 237; 59 S. L. R. 246; 8 Tax Cas. 272.

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It was not contended there that the appellant was in occupation of the land. The whole of the profits from the sale of the potatoes arose out of the occupation by the respondents of these lands and their growing potatoes thereon, and therefore they are assessable under Sch. B.

Sir Patrick Hastings A.-G. in reply. The respondents were in occupation of the lands for only six months of the financial year, the farmer was in occupation for the remainder of the year, and therefore was assessable under Sch. B and no one else was assessable.

Cur. adv. vult.

July 14. ROWLATT J. In this case the respondents are a firm of wholesale potato merchants and fruit and vegetable salesmen and potato growers, who carry on business in London. Besides selling potatoes and acting as potato merchants they grow potatoes on lands which they own and occupy and also on lands of which they are tenants in the ordinary way. They also grow potatoes on lands which are the subject of a special agreement which I have to consider.

They have been assessed to income tax under Sch. D on the profits of their business as potato merchants and salesmen. The profits of their business so far as derived from their own lands on which they grow potatoes and from lands which they take as ordinary tenants on which they also grow potatoes, have not been included in that assessment; they paid income tax under Sch. B in respect of those lands. But the profits the appellants made from the potatoes grown on the lands the subject of the special agreement were included in that assessment, the income tax under Sch. B on those lands having been paid by the farmers who let them to the appellants and who take them from the owners.

It is obvious that inasmuch as these lands have no use for the four seasons of the year—namely, from the autumn to the autumn again, except for growing potatoes, that operation is taxed twice under this assessment. The Special Commissioners have allowed the respondents' appeal, holding that the respondents were in occupation of these

lands for the purposes of Sch. B, and that they ought to have been assessed under Sch. B. The tax under Sch. B has been paid, and this assessment cannot be supported except to the extent, which was not in controversy, of the amount of the commission which the respondents admit in account may be regarded as due to them as salesmen of the potatoes of which they themselves happen to be also the growers.

The Special Commissioners have held that the respondents were in occupation of these lands. The Attorney-General, however, contends that they were not in occupation, but that they only had the advantage of a facility afforded them on the lands by the occupier, the farmer, just as if they had sent him some seed and manure and said: "Raise a crop of potatoes with this seed and this manure for us and we will pay you so much."

The first question I have to decide is whether for the purposes of assessment under Sch. B the respondents were in occupation of the lands the subject of the special agreement. The agreement is rather a peculiar one, because it deals with the land for a season only, the next season the farmer farming the land himself and growing some other crop on the land. So that this agreement operates on so many acres one year and on so many different acres the following year. The agreements are made from year to year. The system is to have so many acres under cultivation for potatoes one year and so many different acres the next year, and so on. It is expressed to be an agreement by which the farmer lets and the respondents take certain specified land; but nothing turns upon words of that sort, one has to look at the substance of the matter. By the first clause the tenants, that is the respondents, are to have possession of the land for the purpose of growing potatoes until the potatoes are fully ripe. The labour involved in growing these potatoes is divided between the farmer and the respondents. The tenants are to provide a certain amount of artificial potato manure to the acre; they are to supply the manual labour, except horses and wagoners, necessary

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to drill the land, plant the seed, etc. The landlord, that is the farmer, has to supply the carting, to deliver the potatoes on rail, to supply straw for pitting the potatoes, and to supply some farmyard manure. By para. 8 the farmer agrees to occupy the land until the potatoes have been cleared off. The respondents agree to pay 3*l.* per acre by way of rent, and 15*l.* per acre by way of reward for the operations done by the farmer.

Sch. B is in respect of profits of the occupation of land, and r. 2 of Sch. A, No. VII., which is made applicable to Sch. B by r. 4 of Sch. B, declares that the person has occupation who has the use of the land. That is as inartificial a word as could be selected to describe the relation between an individual and land. Ordinarily the person who has the use of the land for cultivation purposes is either the freeholder who occupies his own land or a tenant who occupies it as tenant. But I do not think I am concerned, when I have to apply the word "use," to approach the matter from the point of view of a conveyancing lawyer and to say whether or not there is a demise of this land, so as to give the landlord the right of distraint for rent. If there is a possibility of the use of the land without a demise, that is enough. Of course a cestui que trust would be within this word. What I have to look at is the word "use."

Now what is the use of this land for this year? To grow potatoes on, and nothing else. The land begins to be worked for the potato crop in the autumn. The actual day when operations commence depends upon the season and the weather and the administration of the farm belonging to the farmer, who has the horses and the wagons which are required to be used. But in substance the cultivation begins in the autumn, and nothing else is done in the autumn. The potatoes are planted in the spring, they grow all through the summer, and if they are early potatoes they are gathered and the land cleared shortly before the time for cultivating the land for the next season begins; if they are late potatoes they are not gathered so soon, and overlap the

time when cultivating for the next crop begins. Therefore the whole year and the whole value of the soil to grow anything is devoted to these potatoes.

If the respondents have not the use of the land, who has? It is said by the Attorney-General that the farmer has the use of the land. But what does he do? He does not grow potatoes. He lets the tenants have possession of the land. He does the ploughing and supplies the horse labour; speaking roughly he does the general acts of cultivation. The respondents provide the potato seed and drill the land and put the seed in at the time when they choose. They have the whole beneficial right to the crop, and it seems to me that they have the use of the land and that the farmer only contracts to do certain work upon the land at 15*l.* per acre for the persons who have the use of it for growing their potatoes with their own seed all through that year. I can come to no other conclusion than that, and that the growing of these potatoes is the only profit which there is in the land. I think the Special Commissioners were right in saying that the respondents were in occupation of this land. On those grounds they allowed the respondents' appeal against the assessment.

But the Attorney-General argues—and this is a most important point—that even though the respondents were in occupation of the land, they could still be assessed to income tax under Sch. D, because they carry on the trade or business of potato merchants and salesmen in London and the growing of potatoes which they sell is part of their trade, and he says that the proper way to assess them under Sch. D is to take the profits which they make out of their business as a whole and to deduct from that sum the amount to which they are assessed under Sch. B. If that contention is correct there ought also to be brought into their assessment under Sch. D the profits which they make, deducting the amount to which they are assessed under Sch. B in every case, from the lands of which they are owners and the lands of which they are tenants. The result of that would be this, that if the respondents have had a good crop

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and sold it at favourable prices, and have made more profit out of growing potatoes, even on their own land, than the amount of the assessment to Sch. B, they would have to pay income tax under Sch. D on that difference, which in my judgment is a thing unheard of. When an occupier of land pays income tax under Sch. B he pays on the amount, arrived at in accordance with the statute, of the Sch. B assessment. If he makes more profit than that sum, he has not to pay tax upon it; if he makes less than that, he still has to pay the tax, subject to his right to claim a rebate, and the idea that a farmer can be regarded as carrying on a trade so that all the profits that he has made can be taxed under Sch. D, if it exceeds the Sch. B assessment, is to my mind absolutely unwarranted.

The Attorney-General did not contend that in the case of an ordinary farmer one could look into his books and say that if he has made more profit than the assessment to Sch. B allows for, he must pay on the difference under Sch. D as a trade. He agreed that the farmer might sell his potatoes or his crops in the village. I do not think he could deny that the farmer would be entitled to take them to the market town. I also do not think he could deny that the farmer would be entitled to take them to London, if he liked, and sell them there, and that he would not be treated as commencing a new business from the time when he took his crops from his farm on the way to market. I am not referring to the case of a farmer carrying on a butcher's shop, or anything of that sort, to which different considerations apply. The Attorney-General says he would not seek to tax the farmer upon the profit which he makes, owing to the fact he does not sell his produce on his farm but takes it to market. His contention, however, is that the respondents carry on the business of potato merchants and salesmen in London, and that inasmuch as they can therefore sell potatoes well, for that reason they have these farms and this arrangement with the farmers for growing potatoes in order to sell them themselves.

I do not think the respondents' enterprise of growing

potatoes can be mixed up with their business of potato merchants and salesmen. It seems to me that they are simply in the position of potato growers who sell their own potatoes in London, which they have every facility for doing, because they are potato salesmen as well as growers of potatoes. The respondents do not dispute that in addition to their liability to income tax under Sch. B they may be liable to income tax on a sum in the nature of a commission to themselves for selling their own potatoes, in the same way as they sell other people's potatoes in London on the market. But that, I think, is the limit of their liability. Therefore I think that the respondents are right in this case and are entitled to my judgment.

I only wish to make two further remarks. The first is that I do not think any of the decided cases throw any light on this question. The second remark is with regard to the figures. The figures in this case are very startling. The respondents seem to have made an extremely good profit out of growing these particular potatoes. But that cannot possibly affect my judgment. It may be that this land is assessed too low under Sch. B. I do not know. Next year they may make a loss, for all I know. Though that appeals very much to the imagination it does not seem to me that it ought to affect the judgment which I give. My opinion is that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *Edward Betteley.*

R. F. S.

C. A.

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March 31;
April 1, 16.

[IN THE COURT OF APPEAL.]

GREAT SOUTHERN AND WESTERN RAILWAY COMPANY OF IRELAND *v.* THE KING.

Crown—Contract with Government—Work in Connection with Transport in Southern Ireland—Functions and Liabilities of Minister of Transport—Transfer of to Irish Free State—Effect on Contract—Ministry of Transport Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 50), *s.* 2—*Irish Free State* (*Agreement*) *Act*, 1922 (12 *Geo.* 5, *c.* 4), *s.* 1, *sub-s.* 2, *Sched.*, *Art.* 17—*Provisional Government* (*Transfer of Functions*) *Order*, 1922.

By agreements made in the years 1917 and 1918 between officials of the Board of Trade and the suppliant railway company it was agreed that, in consideration of the suppliants taking up the rails and sleepers on portions of their line and transferring them to the Government for the purpose of constructing certain new railways which were required under the wartime conditions then existing, the Government would after the determination of the war pay to the suppliants the cost of replacing the said rails and sleepers with new ones and of reconstructing their railway line. In pursuance of those agreements the suppliants took up a quantity of their rails and sleepers and transferred them to the Government.

By an Order in Council made in December, 1920, under the Ministry of Transport Act, 1919, the "liabilities incurred by the Board of Trade" under the said agreements were expressed to be transferred to the Ministry of Transport.

In pursuance of the agreement made in December, 1921, between Great Britain and Ireland for the creation of the Irish Free State a provisional Government was established for the administration of public services in that State for a period of twelve months.

By an Order in Council made in April, 1922, under the Irish Free State (Agreement) Act, 1922, "the administration of services in connection with . . . . transport . . . . including functions hitherto performed by . . . . the Minister of Transport" were transferred to the department of the Irish Provisional Government styled the "Ministry of Economic Affairs." And by the same Order "any liabilities connected with the functions transferred" thereby were "transferred to the Provisional Government."

By art. 80 of the Schedule to the Irish Free State (Constitution) Act, 1922, "As regards . . . . liabilities the Government of the Irish Free State shall be regarded as the successors of the Provisional Government."

By s. 15 of the Irish Adaptation of Enactments Act, 1922, "Every . . . . contract in writing made before December 6, 1922, ... with any minister department or authority of the late British Government in Ireland . . . . shall if and so far as the . . . . provisions of such . . . . contract . . . . were not fully executed on December 6, 1922, be construed and read as if the name of the minister department authority or official" exercising the corresponding functions in the Free State "was

substituted in such . . . . contract . . . . for the name of the minister department authority or official actually named therein."

On a petition of right the suppliants claimed a declaration that, notwithstanding the above statutes and Orders in Council the liability of the British Government under the said agreements was still subsisting :—

Held, reversing the judgment of Rowlatt J., that the liability had not been transferred to the Government of the Irish Free State, and that the suppliants were entitled to the declaration prayed.

The "functions" transferred to them by the Order of April, 1922, were administrative functions only, and the "liabilities" thereby transferred, being limited to liabilities connected with those functions, did not include any liability to pay the money payable under the agreements.

The " contracts " referred to in s. 15 of the Adaptation of Enactments Act were contracts made by the British Government in Ireland for the benefit of that country, and did not include contracts made for imperial purposes, such as that of assisting the prosecution of the war.

The agreements were made by the officials of the Board of Trade as agents, not of the Board of Trade, but of the Crown, and there was consequently no " liability incurred by the Board of Trade " under the agreements upon which the Order of December, 1920, could operate or which it could transfer to the Minister of Transport and through him to the Government of the Irish Free State.

APPEAL from judgment of Rowlatt J. (1)

By an oral contract made on March 20, 1917, between officials of the Board of Trade and the suppliants, confirmed by a memorandum of the same date initialled by the Chief Secretary for Ireland, and by a letter of March 23, 1917, signed by the assistant secretary of the Board of Trade, it was agreed that in consideration of the suppliants taking up the rails and sleepers on a portion of their line and transferring them " to the Government " for the purpose of being used in the construction of a railway between Athy, one of the suppliants' stations, and Wolfhill collieries, " the Government would pay " the suppliants (1.) the cost of replacing the rails and sleepers so taken up with new rails and sleepers ; (2.) the cost of alterations at certain stations rendered necessary for working each of the said portions of their system as a single instead of a double line of railway ; and (3.) such a sum as would represent the cost of reconstructing the same as a double line. By a second contract in writing contained in letters from the Board of Trade (Railway Department) to the suppliants dated August 14, 1918,

(1) [1924] 1 K. B. 154.

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September 20, 1918, and October 22, 1918, it was agreed that, in consideration of the suppliants taking up certain further rails and sleepers from their line and transferring them to the Government for the purpose of constructing a railway from the suppliants' system to Castlecomer, the Government would pay to the suppliants the same three heads of expenditure that were agreed to be paid under the contract relating to the Wolfhill railway.

The suppliants took up the rails and sleepers on the portions of their line in question, and incurred costs in altering their stations.

By letters in April and May, 1922, addressed to the suppliants, the Ministry of Transport, as successors of the Board of Trade, disclaimed liability to perform the said agreements, and claimed that the liability had been transferred to the Ministry of Economic Affairs of the Provisional Government of Ireland; but the suppliants did not accept that contention, and claimed that the Board of Trade or the Ministry of Transport as their successors remained liable. In August, 1922, the suppliants presented a petition of right in which they claimed (1.) a declaration that the contention of the Ministry of Transport was not well founded and that they were entitled to payment of the amounts due under the agreements from the Board of Trade or their successors the Ministry of Transport; (2.) the sum of 44,763*l.* the liability for which would be incurred by them under the agreements when the lines were relaid; and (3.), in the alternative, an inquiry as to what was a fair sum to be paid to them under the agreements.

By his answer and plea the Attorney-General said that the suppliants were a corporation domiciled in Southern Ireland, and that the liability (if any) under the agreements was transferred to the Irish Ministry of Economic Affairs under and by virtue of the Ministry of Transport Act, 1919 (1):

(1) By s. 2, sub-s. 1, of the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50): "There shall as from such date or dates as His Majesty in Council may by Order determine, be transferred to the Minister" of Transport "all powers and duties of any Government

the Ministry of Transport (Board of Trade Exception of Powers) Order, 1919 (1); the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920 (2); the Irish Free State (Agreement) Act, 1922; the Provisional Government (Transfer of Functions) Order, 1922; the Irish Free State Constitution Act, 1922 (Sess. 2); the Irish Free State (Consequential Provisions) Act, 1922 (Sess. 2); and the Adaptation of Enactments Act, 1922, passed by the Irish Free State Legislature (3), that the liability (if any) had ceased to be chargeable upon Imperial revenue, and had become chargeable upon the revenue of the Irish Free State; that under the agreements the Board of Trade agreed to pay the reasonable cost of work actually done and moneys actually expended by the suppliants, and that unless and until such work was done and moneys expended no moneys became payable to the suppliants; that none of the moneys claimed were for the cost of work actually done or moneys actually expended; and that the suppliants' present claim was not maintainable.

Department in relation to (*a*) railways."

Sub-s. 2: "His Majesty in Council may by Order make such incidental consequential and supplemental provisions as may be necessary or expedient for the purpose of giving full effect to any transfer of powers or duties by or under this section, including provisions for the transfer of any property, rights and liabilities held, enjoyed, or incurred by any Government in connexion with any powers or duties transferred."

(1) By the Ministry of Transport (Board of Trade Exception of Powers) Order, 1919, the powers and duties of the Board of Trade in relation to the Athy-Wolfhill Colliery Railway and the Castlecomer Colliery Railway were transferred to the Ministry of Transport.

(2) By the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920, cl. 2: "As from the 3rd day of December, 1920, all the property, rights and liabilities held, enjoyed or incurred by the Board of Trade in connection with the Athy-Wolfhill Colliery Railway and the Castlecomer Colliery Railway shall be transferred to and vested in the Minister of Transport and such rights and liabilities shall be exercisable by or enforceable against the Minister of Transport in like manner as they would have been by or against the Board of Trade if this Order had not been made."

(3) The material portions of the Irish Free State (Agreement) Act, 1922; the Provisional Government (Transfer of Functions) Order, 1922; the Irish Free State (Constitution) Act, 1922; and the Adaptation of Enactments Act, 1922, will be found set out in the judgment of Warrington L.J.

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Rowlatt J. held that the liability (if any) under the agreements had ceased to be that of the Minister of Transport and had been transferred to the Government of the Irish Free State. He accordingly dismissed the petition.

The suppliants appealed.

Sir John Simon K.C., *Hawke K.C.* and *Eales* for the appellants. Originally the suppliants had under their agreements a subject matter for a good petition of right. It lies upon those who deny that it still exists to show why those agreements have lost their binding force. There has been no novation, no agreement by the suppliants to accept the Government of the Free State as their debtors in substitution for the British Government. Nor has the liability of the Crown been affected by the legislation which has been referred to. At each step in the supposed statutory transfer of liability there is a difficulty in the way of the Crown's contention. The first step is the purported transfer by the Ministry of Transport Order of December 3, 1920, of the "liabilities incurred by the Board of Trade" under the agreements relating to the Athy-Wolfhill and Castlecomer Colliery railways to the Ministry of Transport. Those liabilities are made "enforceable against the Minister of Transport in like manner as they would have been . . . . against the Board of Trade if this Order had not been made." But there were no liabilities under the agreements which could have been enforced against the Board of Trade. The agreements made by officials of that Board were made by them as agents for the Crown, and the only liabilities under them were those of the Crown. There were therefore in fact no liabilities of the Board to transfer. But assume for the purposes of argument that there were. The next step is the transfer by the Provisional Government (Transfer of Functions) Order, 1922, of the "functions hitherto performed by . . . . the Minister of Transport." It is true that by cl. 12 of that Order "liabilities connected with the functions transferred" are to be transferred to the Provisional Government, but that Order was made under the authority of s. 1, sub-s. 2,

of the Irish Free State (Agreement) Act, 1922, which authorized the making of an Order in Council transferring to the Provisional Government the "powers and machinery requisite for the discharge of its duties." But those words are not sufficient. The Order by cl. 1 transferred the "functions heretofore performed by existing Government departments," but the obligation to perform an agreement is not a "function," and the only liabilities transferred were those connected with the functions transferred. Moreover the Act was silent on the subject of liabilities; it said nothing about them. In any view if the Order was intended to include liabilities under the above agreements it was ultra vires. Lastly the Irish Adaptation of Enactments Act has no application to the present case. Here the agreements were made by the Board of Trade in England for the purposes of the war, not by a "department of the late British Government in Ireland." They were made not for the benefit of Ireland, but to enable the British Government to prosecute the war. Sect. 15 of that Act was designed to deal with such matters as contracts made by the Irish Education Minister, or by the Chief Secretary, or the Irish Post Office. Moreover s. 15 only deals with contracts in writing, and here the first of the two contracts was oral; it is so alleged in the pleadings. Again the Irish Legislature has no power to extinguish a liability of the British Government to pay a sum of money. It can only pass Acts for the good government of Ireland, which could have no application to such a matter as this. On the inapplicability of that statute the judgment of Rowlatt J. is in the Crown's favour.

Sir Patrick Hastings A.-G., Sir Douglas Hogg K.C. and *Giveen* for the Crown. The liability under the contracts made with the suppliants was a liability incurred by the Board of Trade, the contracts having been made by officials of that department. The fact that it was a liability of the Board was recognized by the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920, by which that liability was transferred to the Ministry of Transport and made enforceable against

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that Ministry in like manner as it might have been enforced against the Board of Trade if the Order had not been made. That Order was within the powers conferred by s. 2, sub-s. 2, of the Ministry of Transport Act, 1919. Then came the Irish Free State (Agreement) Act, 1922, which by s. 1 gave the force of law to the Agreement between Great Britain and Ireland for the conversion of Southern Ireland into an independent State. That Act by itself, and independently of the Order in Council made for the purpose of giving effect to art. 17 of this Agreement, was sufficient to transfer the liability under the contracts with the suppliants to the Irish Government. When suddenly a portion of the Empire is converted into a self-governing Dominion, the mere fact of that conversion necessarily involves the transfer to the Government of the new State of all contracts of the former Imperial Government in connection with the territory transferred. The new Government must take the obligations under those contracts as well as the rights. The English Government had by contract acquired rights in the land taken for the making of their railways. If their liability under the contracts with the suppliants is not transferred, neither can they have lost their rights under the other contracts by which they acquired the land. But it could not possibly be suggested that the British Government could still enter upon the land and work the railways. Further, by the Provisional Government (Transfer of Functions) Order 1922, cl. 1, and Sch., Part I., the "administration of services in connection with . . . . transport . . . . including functions hitherto performed by . . . . the Minister of Transport" were transferred to the Ministry of Economic Affairs of the Provisional Government of the Irish Free State, and by cl. 12 the "liabilities connected with the functions transferred under this Order" were "transferred to the Provisional Government." Then by art. 80 of Sch. I. to the Irish Free State (Constitution) Act 1922: "As respects . . . . liabilities" the Government of the Irish Free State were to be regarded as the successors of the Provisional Government. But even if the above contentions are wrong

the Irish Adaptation of Enactments Act, 1922, is sufficient to support the claim of the Crown. By s. 15 of that Act every contract made before December 6, 1922, by any department of the late British Government in Ireland shall so far as it is not fully executed be read as if the name of the corresponding department of the Free State were substituted for that of the department by which the contract was made. The suppliants being subjects of and domiciled in the Free State are bound by the provisions of that statute. The revenues of Southern Ireland having been transferred to the Free State, it is but just that the Government of that State should discharge the liabilities under the contracts with the suppliants.

Sir John Simon K.C. replied.

Cur. adv. vult.

April 16. The following written judgments were delivered:—

BANKES L.J. The suppliants in this case are an Irish railway company. They seek by their petition of right a declaration of their rights as against either the Board of Trade or the Ministry of Transport. The answer of the Crown is that whatever rights the suppliants may have had against either of these Government departments, those rights and the consequent liabilities have been transferred, by virtue of the Irish Free State (Agreement) Act, 1922, the Provisional Government (Transfer of Functions) Order, 1922, the Irish Free State Constitution Act, 1922, the Irish Free State (Consequential Provisions) Act, 1922, and the Adaptation of Enactments Act, 1922, passed by the Irish Legislature, and are now enforceable against, the Minister of Economic Affairs of the Irish Free State, the liability (if any) having ceased to be chargeable upon imperial revenue, or revenue available to satisfy a petition of right, and having become chargeable upon the revenue of the Irish Free State. Whether this answer is well founded or not depends upon the construction to be placed upon these statutes and Orders, and it involves a critical examination of them. Before attempting this, it is necessary to ascertain the facts upon which the

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suppliants' claim is founded. It appears that in the years 1917 and 1918, the Government decided, as emergency measures connected with the prosecution of the war, to construct direct railway communication with certain collieries situate in Southern Ireland in order to increase the coal supply. Negotiations were entered into between the railway department of the Board of Trade and the suppliants, as a result of which the suppliants agreed to rails and sleepers being taken up from portions of their existing lines of railway and used for the proposed new railways, upon terms which included (inter alia) an undertaking that the "Government would pay" the cost of replacing the lines taken up and certain other expenses. It is unnecessary to refer to the correspondence in detail. It is sufficient for the present purpose to say that, in my opinion, the undertaking, whatever it amounted to, is contained in the correspondence, and is, therefore, in writing. The earlier correspondence in 1917 and 1918 was between officials of the railway department of the Board of Trade and the suppliants; the later correspondence between an official described as the Director of General Transport (Ireland), whose office appears to have been in Dublin, and the suppliants. I think that the later correspondence must be regarded rather as an explanation of the existing undertakings than as a new agreement, and the correspondence which it is material to consider is that of 1917 and 1918. From the Government side, the parties to the correspondence were officials of the Board of Trade, who purported to bind the Government to make the payments referred to. The right to enter into these obligations is not questioned in these proceedings. What strictly is the effect of entering into them needs to be borne in mind. A somewhat similar question was considered in this Court in the recent case of *Marshal Shipping Co.* v. *Board of Trade.* (1) Assuming the right to enter into the obligations, the Board of Trade were, as agents of the Crown, entering into agreements on behalf of the Crown, agreements which, if enforceable at all, were enforceable only by leave of the Crown as

(1) [1923] 2 K. B. 343.

represented by the Attorney-General, and by way of petition of right. It is, in my opinion, quite incorrect to speak of such agreements as agreements by the Board of Trade, or as agreements creating a liability of the Board of Trade. The first question for decision in the present case is whether or not in the statutes and Orders in Council which have to be considered, the expressions "contract" and "agreement" by a Government department have not throughout been used in an incorrect sense as meaning an agreement or a contract entered into by a department on behalf of the Crown, and "liability" of a department as meaning an obligation which may or may not be recognized by the Crown, but which in any event is only enforceable by petition of right. The answer of the Attorney-General certainly uses the expressions in this incorrect sense, and I think that the same view must be taken of the general language used in the statutes and Orders in Council, to which it is necessary to refer. Take, for instance, the Ministry of Transport Act, 1919, and the first two Orders in Council in order of date—namely, the Ministry of Transport (Board of Trade Exception of Powers) Order, No. 1440 of 1919, and the Ministry of Transport (Athy-Wolfhill and Castlecomer Railways Transfer of Property) Order, No. 2296 of 1920, by which the rights and liabilities of the Board of Trade in connection with these railways were transferred to the Minister of Transport, and were made enforceable against the Minister of Transport in like manner as they would have been against the Board of Trade, and by which it was further provided that in the construction of any contract made in relation to these railways, the name of the Minister of Transport should be substituted for the name of the Board of Trade. It appears to me impossible to read this Order without coming to the conclusion that the expressions "contract" and "liability" are intended to include an agreement such as the one made by the officials of the Board of Trade and the suppliants, and the kind of liability which such an agreement involves. I have come to the same conclusion with reference to the Acts and Orders in Council, which it is now necessary to

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examine, and I think that it is impossible to read the expressions as confined to what would be accurately described as agreements made by a Government department, or as liabilities of a department. The argument for the Crown, as I understood it, was in substance that so far as the Acts of Parliament and the Orders in Council setting up the Irish Free State and defining its Constitution were concerned, it was a necessary consequence of the creation of the Free State, and the transference of the powers and obligations of Government from the British Government, first to the Provisional Government and then to the Legislature of the Free State, that all such liabilities as the one in question should be transferred, and that general words would be found in the Acts of Parliament and the Orders in Council giving effect to the transfer. On the other hand, it was contended for the suppliants that, whatever the arrangements between the two Governments might be as to which of them should ultimately provide the money necessary to discharge the liability of the suppliants, there was nothing in either the Acts of Parliament or the Orders in Council depriving the suppliants of their right to insist that the agreements made by them with the officials of the Board of Trade were subsisting agreements with a department of the British Government, and enforceable by the appropriate machinery of a petition of right presented to the Courts of this country. A careful examination of these Acts of Parliament and Orders in Council has satisfied me that the suppliants' contention is correct.

In order of date, the first document which needs consideration is the Articles of Agreement for a Treaty between Great Britain and Ireland, dated December 6, 1921. By this agreement, Ireland was to have the same constitutional status in the community of nations as Canada, Australia, New Zealand, or South Africa, and a Provisional Government was to be constituted to which, by art. 17, the British Government would transfer for a period, not exceeding twelve months, "the powers and machinery requisite for the discharge of its duties." These articles of agreement were

given the force of law by the Irish Free State (Agreement) Act, 1922, which, by s. 1, sub-s. 2, provided that for the purpose of giving effect to art. 17, Orders in Council might be made transferring to the Provisional Government established under that article the powers and machinery therein referred to. The Attorney-General laid great stress upon the concluding words of this sub-section, which are as follows: "Any Order in Council under this section may contain such incidental, consequential, or supplemental provisions as may appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of this section." Attention is called to the fact that what is there referred to is the "section" and not the "sub-section," and that inasmuch as sub-s. 1 gives statutory effect to the agreement creating the Irish Free State, the words quoted are wide enough to permit of any necessary or proper provisions being made for the transfer of the powers and obligations of the one Government to the other. I do not agree with this view, as I think that the words relied on are governed and controlled by the fact that they refer to something which is to be contained in an Order in Council made under the section, and the only Order in Council contemplated by the section is one confined to a transfer for the purpose of giving effect to art. 17 of the Treaty. However that may be, I fail to find in any Order in Council made under the section any provisions having the effect contended for by the Crown. The Order relied on is the Provisional Government (Transfer of Functions) Order, 1922, No. 315 of 1922. This Order deals primarily with the transfer of the functions in connection with the administration of public services in Southern Ireland heretofore performed by existing Government departments and officers; and it provides that as from a given day they shall be transferred to and become exercisable by the department and officers of the Provisional Government set out in Part I. of the Schedule. On turning to the Schedule one finds that to the Minister of Economic Affairs there is transferred "the administration of services in connection with trade and commerce, transport, electricity and shipping, including

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functions hitherto performed by the following existing Government Departments and officers, viz., the Minister of Transport and the Board of Trade." Incidental to the transfer of the functions referred to in the Order there are a number of financial provisions which appear to me to be in the nature of adjustments of account between the two Governments, and not in any way to touch such an obligation as the one the suppliants are seeking to enforce by their petition of right. The expression "functions" used in the Order is, I think, used in reference to administrative functions, a short way of expressing what is described in art. 17 of the Treaty as the "powers and machinery requisite for the discharge of the duties" of the Provisional Government. I cannot read the transfer of the functions of the Minister of Transport in connection with the administration of public service in Ireland as having any reference to existing obligations such as the one the suppliants seek to enforce. If this is so then cl. 12 of the Order is of no assistance to the case of the Crown, because the liabilities referred to are only liabilities connected with the functions transferred. If this view is not correct and the liability now in question is a liability connected with the exercise of the transferred function of the Minister of Transport, then it would appear to fall within the exception of cl. 6 (iii.), which provides that "Nothing in the Order shall affect the administration of any service before the day of transfer or the manner in which or the fund out of which the cost of the administration of that service before the day of transfer is to be provided," and cl. 13 (vi.) has no application, as it is certainly not necessary for the purpose of transfer that the name of the Minister of Economic Affairs should be substituted for that of the Minister of Transport or the Board of Trade in the undertaking with the suppliants. There is this further difficulty in accepting the argument for the Crown as to the effect of this Order arising out of the agreement of April 1, 1922, between the two Governments fixing the date of transfer as on that date, because it seems doubtful whether that agreement has any reference to the suppliants' claim, which

would appear to be included in the "winding up of matters pending at the date of transfer" which were excepted from the agreement, and as to which no date of transfer has apparently as yet been fixed. For these reasons I think that down to this point nothing has been done affecting the suppliants' right to proceed by way of petition of right in these Courts, whatever may be the position as between the two Governments as to the ultimate responsibility between themselves for the discharge of the obligation sought to be enforced by the suppliants. It is, I think, unnecessary to deal at length with the Irish Free State Constitution Act, 1922 (Sess. 2) or the Irish Free State (Consequential Provisions) Act, 1922, which provide for the coming into operation of the Constitution of the Irish Free State, and for the making of such provisions as were consequential on, or incidental to, the establishment of the Irish Free State, as there is nothing in these statutes which, in my opinion, bears upon the matter. Art. 80 of the Constitution was referred to. It is in the following terms: "As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Eireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Eireann), as the successors of such department of the British Government."

I have already pointed out the reasons why, in my opinion, the fact that the Government of the Irish Free State become the successors of the Provisional Government is for the present purpose immaterial, and why also, in my opinion, it is immaterial that the Government of the Irish Free State become for certain purposes the successors to the functions of the Board of Trade or the Minister of Transport. In passing it is, I think, material to call attention to s. 7 of the later of the two Acts, as pointing to a conclusion contrary to that contended for by the Crown. I have so far dealt with all the material legislation of the British Parliament and the material Orders in Council relating to the setting up of

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the Irish Free State. There remains only to consider an Act passed by the Irish Parliament on December 20, 1922. The preamble recites (inter alia) that it is desirable to make provision for the continuance of pending Government contracts. The provision is contained in s. 15, to which I find it difficult to attach any intelligible or clear meaning. It is in these terms: "Every deed and every contract and agreement in writing made before the 6th day of December, 1922, with or by any person by or with any Minister, department or authority of the late British Government in Ireland or the late Provisional Government of Ireland, or by or with any official of either of those Governments acting on behalf of such Government, shall if and so far as the terms and provisions of such deed, contract or agreement were not fully executed and completed on the 6th day of December, 1922, be construed and read as if the name of the Minister, department, authority or official exercising in Saorstát Eireann functions the same as or corresponding to the functions exercised at the date of such deed, contract or agreement in respect of the area now comprised in Saorstát Eireann by the Minister, department, authority or official named in such deed, contract or agreement was substituted in such deed, contract or agreement for the name of the Minister, department, authority or official actually named therein." Some limitation must be put upon the contracts and agreements referred to, which are so generously described as "Every contract and agreement." One would think that a necessary limitation is that the contracts and agreements must relate to something to be done in Southern Ireland and which it is intended should under existing conditions be performable by the appropriate Minister or department of the Irish Free State. Again, when the section speaks of the Minister, department or authority of the late British Government in Ireland is it referring only to a Minister, department or authority functioning in Ireland, or is the reference to Ireland merely a part of the description of the British Government? I do not myself think that a construction can be placed upon this section which could include

such agreements as the present, from which the British Government has derived all the benefit for Imperial purposes which the agreements were intended to confer, and which remain unperformed only to the extent of making the promised payments. For these reasons I think that the appeal must be allowed and the declaration No. 1 must be granted, with the addition of words limiting the payments to payments which will become due when the work covered by the agreements is actually completed in accordance with the terms thereof. The appellants must have the costs here and below. I agree with the form of declaration proposed by Warrington L.J.

WARRINGTON L.J. This appeal arises in the matter of a petition of right in which the Great Southern and Western Railway Company of Ireland are suppliants. The question raised is whether the suppliants can maintain a petition of right for the purpose of establishing their alleged title to receive out of the British Treasury certain sums of money which they say will in certain events become payable to them under agreements made with them by representatives of the British Government on behalf of the Crown before the severance of Southern Ireland from the United Kingdom and the setting up of the Irish Free State as an independent self-governing Dominion under the King. The Attorney-General on behalf of the Crown contends that, as the result of that severance and of the legislative and executive arrangements consequent thereon, the obligation undertaken on behalf of the Crown has ceased to be an obligation of the British Government, and has been effectively transferred to that of the Irish Free State, and that it is to that Government alone that the suppliants must look for its performance. This view has been accepted by Rowlatt J., who has directed judgment to be entered for the Crown. The suppliants appeal.

It is unnecessary to state the exact terms of the two agreements. It is enough to say that in each certain officials of the Board of Trade, and, in one of the two cases, the Chief Secretary for Ireland, undertook that the Government would

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pay the cost of relaying certain parts of the company's line which had been disturbed for the purpose of enabling the Board of Trade during the war to increase the supply of coal by constructing certain branch lines to collieries in the neighbourhood. In my opinion, nothing becomes payable under the agreements until the works have been done and the actual cost thereof ascertained.

The construction by the Board of Trade of the two colliery branches was a war measure set on foot by them as the controllers of the railways of the United Kingdom and by virtue of powers conferred by reg. 2A of the Defence of the Realm Regulations. Except that the suppliant railway was an Irish company and the site of the proposed branch railways was in Ireland, as were the railways the expense of reconstructing which was to be paid by the Government, the agreements did not relate to matters in which Ireland was specially concerned; they were administrative steps of the Government of the United Kingdom taken in pursuance of its general policy during the war. From the time of the completion of the branch railways, which happened before the severance of the Irish Free State from the United Kingdom, no administrative step remained to be taken by any Government department in the matter. Nothing had to be done by the Government except to pay what they had, by their officers, undertaken to pay on the fulfilment by the suppliants of the stipulated conditions. It is also extremely important to bear in mind that to the agreements as reduced into writing the Board of Trade are not parties. The agreements do not purport to make them liable for the moneys in question. Moreover, though the agreements were in fact made by officials of the Board of Trade they acted merely as servants of the Crown, and the agreements imposed no personal liability either on the individual officials or on the Board itself. The Government on whose behalf the undertakings were given means, I apprehend, the King himself as the chief executive authority in the State. Such an undertaking involves no liability in the strict legal sense, inasmuch as it cannot be enforced by action. Any person

who alleges such an undertaking and desires to claim its fulfilment by legal proceedings can only do so by petition of right, and only so if the King allows the proceeding by his fiat on the petition. If the petitioner establishes his claim he obtains relief in the special form provided by ss. 9 and 14 of the Petition of Right Act, 1860.

I now proceed to state the several legislative and administrative proceedings by which it is said that the duty of performing the obligation purported to be imposed upon the Government of the United Kingdom has been transferred to that of the Irish Free State with the result mentioned above. In the year 1919 the Ministry of Transport was established, and by the Ministry of Transport Act, 1919, there were transferred to the new Minister all the powers and duties of any Government department in relation to (amongst other things) railways, and it was provided by s. 2, sub-s. 2, that His Majesty in Council might by Order make such incidental, consequential and supplemental provisions as might be necessary or expedient for the purpose of giving full effect to any transfer of powers or duties under the section, including provision for the transfer of any property, rights and liabilities held, enjoyed or incurred by any Government department in connection with any powers or duties transferred. The date of transfer was to be fixed by Order in Council, and by an Order dated September 22, 1919, the date was fixed as September 23. By another Order in Council made under s. 2, sub-s. 2, of the Act on December 3, 1920, it was provided that as from that date all the property, rights and liabilities held, enjoyed or incurred by the Board of Trade in connection with the two colliery railways in question should be transferred to and vested in the Minister of Transport, and that such rights and liabilities should be exercisable by and enforceable against the Minister of Transport in like manner as they would have been by or against the Board of Trade if the Order had not been made, and that (3.) in the construction and for the purposes of any . . . . contract . . . . made before the date of the Order in reference to the two railways the name of the

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Minister of Transport should be substituted for the name of the Board of Trade. As I have already pointed out, no liability towards the suppliants was incurred by the Board of Trade in connection with either of the agreements in question, nor was there any contract material to the present case in which the name of the Board of Trade appeared as the contracting party. The Order of December 3, 1920, was therefore inoperative so far as the obligations now sought to be established are concerned. There might, however, have been and probably were liabilities of the Board of Trade in connection with the actual construction of the branches, which was undertaken by the Board itself, and to these the Order would apply.

The Agreement for a Treaty between Great Britain and Ireland was dated December 6, 1921, and by virtue of the Irish Free State (Agreement) Act, 1922, obtained the force of law as from the date of the passing of the Act—namely, March 31, 1922. Under the statute the Irish Free State acquired the constitutional status of an independent self-governing Dominion within the British Empire. By art. 17 of the Agreement it was provided as follows: "By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof." By s. 1, sub-s. 2, of the Act it was enacted as follows, omitting immaterial parts: "For the purpose of

giving effect to Article 17 of the said Agreement, Orders in Council may be made transferring to the Provisional Government established under that Article the powers and machinery therein referred to. . . . . Any Order in Council under this section may contain such incidental, consequential, or supplemental provisions as may appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of this section." Under sub-s. 3 any Order made under the section was to be laid before both Houses of Parliament with provisions for its annulment on address of both Houses, and subject to these provisions was to be of the same effect as if enacted in the Act. Provision was made in the agreement for the assumption by the Irish Free State of certain specified liabilities incurred on behalf of the United Kingdom, but no provision was made for the transfer to or the assumption by the Irish Government or any department thereof of such liabilities as those now in question.

Prior to the date of the Order next to be mentioned the departments of the Provisional Government mentioned in Part I. of the Schedule to the Order had been constituted by that Government to discharge the functions therein mentioned as assigned to them respectively, and the Exchequer of the Provisional Government had been constituted subject to regulations made by the Provisional Government and set out in Part II. of the said Schedule.

By an Order in Council dated April 1, 1922, and purporting to be made under art. 17 of the agreement, it was provided as follows, so far as is material for the present purpose. Clause 1 is: "The functions in connection with the administration of public services in Southern Ireland heretofore performed by existing Government departments and officers, shall, as from the day of transfer, be transferred to and become exercisable by the departments and officers of the Provisional Government to which the functions are severally so assigned as aforesaid but without prejudice to the power of the Provisional Government to redistribute those functions amongst its departments and officers as it thinks proper."

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Then cl. 3 (i.) provides that: "As from the day of transfer and subject to the provisions of this Order or any arrangement made thereunder and without prejudice to any ultimate financial settlement, the proceeds of all such taxes so collected as aforesaid and all such other sums collected or received by or on behalf of departments and officers of the Provisional Government as would but for this Order have been payable into the Exchequer of the United Kingdom shall be paid into the Exchequer of the Provisional Government, and out of that Exchequer there shall, subject to the regulations contained in Part II. of the Schedule to this Order, be defrayed the cost of the administration of public services by the Provisional Government, including the repayment to the Exchequer of the United Kingdom of any sums paid out of that Exchequer on account of public services in Southern Ireland after the date when the power of collecting taxes is transferred to the Provisional Government." Then cl. 6 (i.) is: "The functions of existing Government departments to be transferred under this Order to the several departments of the Provisional Government to which the same are assigned respectively, shall be so transferred on such day (in this Order referred to as the day of transfer) as may be agreed between the British Government and the Provisional Government." Then cl. 6 (iii.) is: "Nothing in this Order shall affect the administration of any service before the day of transfer, or the manner in which, or the fund out of which, the cost of the administration of that service before the day of transfer is to be provided." Clause 12 is: "Any property, assets, rights and liabilities connected with the functions transferred under this Order shall, if connected solely with those functions, be transferred to the Provisional Government." Clause 13 (vi.) is: "In the construction and for the purposes of any deed or contract made before the transfer of functions to a department or officer of the Provisional Government from any existing Government department or officer under this Order, but so far only as may be necessary for the purpose of such transfer, the name of the department or officer of the Provisional

Government shall, as from the day of transfer, be substituted for the name of the existing Government department or officer."

The Schedule is in two columns, the first being headed "Departments of Provisional Government," and the second "Functions assigned." In the first column appears "Ministry of Economic Affairs," and against this in the second column "The administration of services in connection with Trade and Commerce, Transport, Electricity and Shipping including functions hitherto performed by the following existing Government departments and officers: The Ministry of Transport, the Board of Trade." Against the Ministry of Finance in the first column appears amongst other things the words: "The financial business of the Provisional Government including functions hitherto performed by the following existing Government departments and officers," and amongst them is "The Treasury." It seems to me reasonably clear that neither cl. 1 nor the second branch of cl. 3 (i.) even purports to transfer such a liability as that now in question. The word "functions," in my opinion, connotes the administrative acts, powers and duties formerly done, enjoyed and performed by the several departments of the British Government and does not include an obligation for payment of money imposed upon the Crown by the acts of its officers prior to the transfer. So also "the cost of the administration of public services," in my opinion, means "the cost of performing the functions transferred." Clause 13 (vi.) carries the matter no further. As already pointed out, there is no contract in which the name of any department appears as a contracting party, and the effect of the clause is further limited by the words "so far only as may be necessary for the purpose of such transfer." that is to say, of "functions." Clause 12 was relied upon by the Crown, but again the liabilities purported to be transferred are those "connected with the functions transferred," that is to say, as I think, with the exercise of the administrative powers and duties included in the word. If the clause goes further then, in my opinion, it is beyond the authority under

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which it was made, the incidental consequential and supplemental provisions authorized being only such as may appear necessary or proper for giving effect to (as I read the Act for the purpose of the present case) a transfer of powers and machinery.

In my opinion, therefore, so far as the provisional arrangements are concerned there is nothing in them which even purports to relieve the Crown from the obligations in question. The agreement of April 1, 1922, made between the British Government and the Provisional Government for fixing the date of transfer of the functions mentioned in the Order of the same date with the exceptions specified therein does not, in my opinion, affect the question one way or the other. It has nothing to do with liabilities, but is concerned with functions only. The Act sanctioning the Constitution of the Irish Free State received the Royal Assent on December 5, 1922. The Constitution itself is annexed by way of Schedule. It contains one clause, which is relied upon by the Crown, that is, art. 80 : "As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Eireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Eireann) as the successors of such department of the British Government." Whatever may be the effect of the use in this article of the term "successors" in reference to the transfer of liabilities it is here employed in reference only to departmental liabilities, and, as I have already pointed out, the obligation sought to be established is an obligation of the Crown itself and not of a department. The Irish Free State (Consequential Provisions) Act, 1922, which also received the Royal Assent on December 5, 1922, contains nothing material to the question in issue. So far, therefore, as the Acts of the Imperial Parliament and the Orders in Council made thereunder are concerned nothing has taken place which has the effect of relieving the Crown from the obligation imposed upon it by the agreements in

question, or of shifting the ultimate performance of that obligation from the British Treasury to the Irish Exchequer.

It remains to consider the effect of an Act of the Parliament of the Irish Free State intituled Adaptation of Enactments Act, 1922, passed on December 20, 1922. The full title and the preamble seem to me to be material, as showing what was the purpose and intention of the Irish Legislature in passing the Act. The title is as follows: "An Act to interpret and to adapt to the circumstances of Saorstát Eireann"—that is, of the Irish Free State—"certain Acts of the British Parliament having the force of law in Saorstát Eireann and certain statutory rules, orders and regulations and certain contracts." Then the preamble, after referring to certain sections of the Constitution and to the Acts to which I have already referred of the Imperial Parliament, proceeds as follows: "And whereas it is necessary in order to enable such Acts to have full force and effect in the Irish Free State that certain interpretations and adaptations of such Acts and of all orders rules and regulations made thereunder should be made, and whereas it is desirable to make provision for the continuance of pending Government contracts." It is that last paragraph, which is of special importance as bearing directly on the true construction of s. 15, which is in the following terms: "Every deed and every contract and agreement in writing made before the 6th day of December, 1922, with or by any person by or with any Minister, department or authority of the late British Government in Ireland or the late Provisional Government of Ireland, or by or with any official of either of those Governments acting on behalf of such Government, shall if and so far as the terms and provisions of such deed, contract or agreement were not fully executed and completed on the 6th day of December, 1922, be construed and read as if the name of the Minister, department, authority or official exercising in Saorstát Eireann functions the same as or corresponding to the functions exercised at the date of such deed, contract or agreement in respect of the area now comprised in Saorstát Eireann by the Minister, department, authority or official named in such

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deed, contract or agreement was substituted in such deed, contract or agreement for the name of the Minister, department, authority or official actually named therein." It is said that the effect of this section is to impose upon the suppliants as an Irish company the duty of looking to the Irish Government exclusively for the performance of the obligations imposed on the Crown by the agreements in question. Whether an Act of the Irish Legislature could have such an effect in these Courts is, in my opinion, a question of doubt and difficulty. But, in my opinion, it does not arise for decision in the present case. In the first place there is no contract in writing in which the name of any Government department appears as a contracting party, and in the second place I think, having regard to the recital, the contracts intended to be affected were those relating to departmental administration in Ireland pending at the date of transfer and not such an obligation as that in question, which was one undertaken by the British Government in furtherance of its general policy for the defence of the realm in time of war. For these reasons I think the appeal ought to be allowed.

As to the form of judgment I agree that the suppliants are not entitled to be paid until they have completed the work, but as the question as to their title even to this payment has been disputed I am of opinion that they are entitled to a declaration and that it should be to the effect that if and when the suppliants shall have reconstructed so much of their railway as was disturbed for the purpose of supplying materials for the construction of the colliery railways in the petition mentioned respectively they will be entitled to be paid the sum expended by them in such reconstruction, subject in the case of the Castlecomer Railway to an allowance for betterment to be agreed between the suppliants and the Crown, or failing agreement to be determined by a railway engineer agreed upon by both parties. I think the Crown must pay the costs here and below.

SCRUTTON L.J. The petition of right in this case claims against the Crown under two agreements in respect to a

railway in Ireland. The Attorney-General replies that the liability, if any, under the agreements has been by statute transferred to certain departments of the Irish Government and to the Irish revenue to the exclusion of any rights against the English Government or the English or British Exchequer. The suppliants have never consented to such transfer or exclusion; but it may have been effected without their consent by Act of Parliament.

The subject matter of the agreement is the duty to replace, or bear the cost of replacing certain rails and sleepers taken up from the suppliants' railway line in Ireland during the war. The suppliants are a company owning an Irish railway, whose head office, seat of management and domicil is in Ireland. The first agreement, relating to a branch railway to the Wolfhill Colliery, was negotiated at an interview in London, at which the Chief Secretary for Ireland, the President of the Board of Trade, and the Controller of Mines were present on behalf of the Government. A memorandum was drawn up, initialled by the Chief Secretary, stating that "the Government" would undertake that provision should be made for the relaying by the company of any portion of its system which might be displaced to provide construction materials for the intended new line to Wolfhill, and two letters, wherein the Board of Trade, as the Government department dealing with railways, stated that "the Government" would undertake to bear the cost of replacing the rails taken up by new lines and sleepers.

The second agreement related to a branch line to Castlecomer Collieries. It was negotiated by all sorts of officials, English and Irish, and culminated on August 14, 1918, in an assurance given in writing by the Board of Trade that "the Government" would bear the cost of replacement of all permanent-way materials supplied by the company in connection with the Castlecomer line. Further, in 1920, a further adjustment by agreement with regard to both lines was made through the Ministry of Transport, whose interest in the matter I deal with subsequently.

The original position of the suppliants was that they had

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agreements with the Crown, negotiated through the servants of the Crown, the Ministers of Trade and Transport. They had, strictly speaking, no rights against the Crown, nor had the Crown liabilities that could be enforced at law, but the Sovereign might allow the consequences of the agreement to be determined under a petition of right. The suppliants had no rights against the Board of Trade or its officials, none of whom were personally liable on the agreement they had made as agents of the Crown. The difficulties that may arise in this connection appear in the judgment of this Court in *Marshal Shipping Co.* v. *Board of Trade.* (1)

The first step in the chain of statutes and Orders on which the Attorney-General relies is the Ministry of Transport Act, 1919, s. 2 of which transfers to the Ministry of Transport all powers and duties of any Government department in relation to railways, with a provision that His Majesty in Council may by Order make provisions for the transfer of any property, rights and liabilities held, enjoyed or incurred by any Government department in connection with any powers or duties transferred. Under this provision an Order in Council, 1920, No. 2296, was made transferring to the Minister of Transport "all property, rights and liabilities" held, enjoyed or incurred by the Board of Trade in connection with the Athy-Wolfhill Colliery Railway and the Castlecomer Railway, "and such rights and liabilities shall be exercisable by or enforceable against the Minister of Transport in like manner as they would have been by or against the Board of Trade if this Order had not been made." The effect of this is by no means clear; the Board of Trade were not "liable" on any contract in connection with either railway. They were not parties to any contract in connection with either railway; they could not be sued on any such contract. Parliament and the draftsman of the Order in Council obviously intended the Act and Order in Council to have some effect, but I find it very difficult to see how those provisions could create a "liability" in the Board of Trade, which did not exist before,

(1) [1923] 2 K. B. 343.

or transfer a liability, which did not exist, to the Ministry of Transport.

Next came the provisions with reference to the establishment of the Free State Government. An agreement was made between representatives of the British Government and of Southern Ireland, which, by an Act of Parliament (12 Geo. 5, c. 4), was "given the force of law." Arts. 1 and 2 of that agreement set up an Irish Free State with a Parliament having powers to make laws for the Government of Ireland and an Executive responsible to that Parliament, the State to have the same relation to the Crown and Imperial Parliament as the Dominion of Canada. As some time must elapse before the Irish Parliament could be established and Ireland must be governed during that time, it was provided by art. 17 of the agreement that a "Provisional Government" should be constituted and that the British Government should transfer to the Provisional Government the powers and machinery requisite for the discharge of its duties; but this arrangement was not to last beyond twelve months from December 6, 1921, the date of the agreement. To carry art. 17 of the agreement into effect provision was made in the Act, s. 1, sub-s. 2, that Orders in Council might be made transferring to the Provisional Government "the powers and machinery therein referred to." It was also provided that any Order in Council "under this section" might contain such incidental provisions as may appear to be necessary and proper for the purpose of giving effect "to the foregoing provisions of this section." In the phrase, "Any Order in Council under this Section," the word "Section" must, I think, refer to the sub-section giving the right to make Orders in Council, and similarly "the foregoing provisions of this Section" must, I think, mean the sub-section in question, and not, as Rowlatt J. seems to think, refer to the whole section. To read it in this way would be to authorize the carrying into effect of the agreement, as a permanent provision, by Orders in Council, which cannot have been the intention of Parliament. There is a further sub-section, that Orders in Council made under this Act

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shall be laid before both Houses of Parliament, and, if no address is presented by either House, asking the Crown to annul them, shall be of the same effect as if enacted in the Act. I remain of the opinion that I expressed in *Ex parte Brady* (1), that this provision does not give statutory effect to an Order in Council going beyond the limits and purposes authorized by the Act. It allows Parliament to modify or avoid an Order in Council made within the powers of the Act, which, if not avoided, will have statutory force; but it does not, in my view, validate an Order in Council outside the powers given by the Act.

Having obtained this Act, the next step was an Order in Council to give effect to art. 17 of the agreement. This was The Provisional Government (Transfer of Functions) Order No. 315, 1922. It recited that the Provisional Government had constituted certain departments to discharge the "functions" mentioned in the Schedule. This it had done by a decree of March 31, 1922, by which "the functions and services in connection with Transport" were assigned to the Ministry of Economic Affairs under the phrase "administration of services." By cl. 1 of the Order the functions in connection with the administration of public services in Southern Ireland hitherto performed by the Board of Trade and Ministry of Transport were transferred to the Irish Ministry of Economic Affairs. The proceeds of taxes as from the day of transfer, April 1, 1922, were transferred to the Provisional Government. This date (April 1) was agreed between the two Governments as the date of transfer of the functions, "except . . . . functions of the Board of Trade in relation to lighthouses, buoys and beacons, functions of the Paymaster-General in relation to services not transferred and the winding up of matters pending at the date of transfer." I think the reference to pending matters relates to matters then in the Paymaster-General's office, and not to contracts in course of performance in the department of the Board of Trade. The question of payment for rails relaid was not in or

(1) (1921) 91 L. J. (K. B.) 98, 107.

anywhere near the Paymaster's office, as nothing had been done about relaying rails. It was provided by the Order, cl. 3, that out of those taxes should be paid by the Provisional Government "the cost of administration of public services." By cl. 6 (iii.) the Order was not to affect the cost of administration of any service before the day of transfer. I do not think "cost of administration" can be limited to the establishment expenses of the department; I think it must extend to the services as well as the servants. The functions and the cost being transferred, there would naturally arise a question about pending contracts or businesses or transactions. These appear to be provided for by cl. 13 (vi.) of the Order. In any deed or contract made before the transfer of functions the name of the department or officer of the Provisional Government is to be substituted for the name of the existing Government department or officer, and where any "thing" in relation to functions transferred has been commenced by the authority of an existing Government department before the day of transfer such "thing" may be carried on and completed by, or by the authority of, the department of the Provisional Government. This certainly appears to contemplate that in any pending contract the name of the Irish department is to be substituted for that of the English department, subject to the difficulty in the present case that the contracts did not mention the names of any Government department, but only said "the Government"; and that the services involved shall become "exercisable" by the Irish department, who "may" carry out and complete the unfinished "thing." "Thing" is a very odd word to use in an Act of Parliament to denote business matters. In these clauses the draftsman seems carefully to refrain from binding the Provisional Government to carry out existing business; the functions are "exercisable"; the "thing" "may" be completed, not "shall" be completed. It is quite possible that the Irish Government were not prepared to take over all existing British contracts as a matter of duty, and the British Government were not prepared to ask them to take

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over in that way; but it may be that the draftsman doubted, in view of the agreement, whether an Order in Council would bind the Provisional Government in executive matters. Last came cl. 12: "Any property, assets, rights and liabilities connected with the functions transferred under this Order shall be transferred to the Provisional Government." If the Board of Trade and its successor, the Minister of Transport, had "liabilities" connected with the transferred functions, then for the purposes of the Provisional Government and for a period ending with December 6, 1922, those "liabilities" were transferred. The difficulty still remains whether the Board of Trade, who were not a party to any agreement with the suppliants, but who negotiated the agreement, and would on behalf of the Crown supervise its carrying out, had a liability in respect to it which, by way of the Ministry of Transport, was transferred. There is a proviso in cl. 13 (ii.) (*c*) of the Order in Council which I thought might have some bearing on the question: "Provided that nothing in this Order shall affect prejudicially without the consent of the person entitled thereto, the right of any person to the benefit of a charge on the Consolidated Fund of the United Kingdom in respect of any sums due to him." A suppliant obtaining judgment under a petition of right receives under s. 13 of the Petition of Right Act a certificate of the judgment from the judge, and then the Treasury, by s. 14, are required to pay the amount "out of any moneys in their hands, legally applicable thereto, or which may be hereafter voted by Parliament for that purpose." It is true that these funds will be part of the Consolidated Fund, but I think the expression right to the "benefit of a charge on the Consolidated Fund" refers to those matters specifically charged on the Fund, as judges' salaries are by the Judicature Act, 1873, s. 13, which uses the words "shall be charged on and paid out of the Consolidated Fund." A list of such charges will be found in Halsbury's Laws of England, art. "Revenue," s. 1602. I do not think, therefore, this proviso avails the suppliants, and indeed their counsel did not so argue. The powers of the Provisional Government

were and could only be granted until December 6, 1922. Accordingly, on December 5, 1922, an imperial Act gave force to a Constitution for the Irish Free State to come into effect on a date which was in fact December 6, 1922. The material clause is art. 80, which provides that as regards departmental property, assets, rights and liabilities the Government of the Irish Free State shall be regarded as the successor of the Provisional Government and to the extent to which "functions" of any department of the British Government become "functions" of the Irish Free State, as the successors of such department of the British Government. This is again difficult to understand; the personal representative or successor of a dead man does not necessarily succeed to his rights and liabilities; not for instance to his liability under a contract to perform a personal service, not to his right to recover damages for a personal injury. The powers of the Provisional Government terminated on December 6, 1922. It is not easy to see that to call the Irish Free State Government a "successor" by itself continues those temporary and expiring powers. Lastly an Irish Act of 1922 recited that it was desirable to make provision for the continuance of pending Government contracts, and s. 15, dealing with a similar subject matter to cl. 13 (vi.) of the Order in Council of April 1, 1922, provided that any contract or agreement in writing made before December 6, 1922, with any Minister, department, or authority of the late British Government in Ireland, or with any official of that Government shall, if the terms of the agreement be not completed on December 6, 1922, be construed and read as if the name of the Minister, department, authority or official exercising those functions in Ireland which were formerly exercised by such named Minister, etc., was substituted in the contract or agreement for the Minister, etc., actually named therein; and s. 16 adds that the obligations imposed on the first-named Minister shall be transferred to the substituted Minister. The trouble about this is that the agreements in question do not appear to me to name or impose any liability on any "Minister"; they both speak

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of "the Government," without making any Minister a contracting party.

I have felt great doubt about the result of these enactments; the language used is singularly inappropriate to deprive the suppliants of their original right. On the one hand it may be said that the Court ought not to be astute to defeat what is said to be the broad purpose of these documents to transfer rights and liabilities relating to Irish matters to the Irish Government with the funds relating thereto. On the other hand it is by no means clear that the Irish Government undertook to carry out all existing contracts, and one would be reluctant to decide that question in the absence of the Irish Government; and further, in my view, clear words are necessary to deprive a creditor or contracting party of the security of a person or fund on which he has been relying, and substitute without his consent another with whom he would not have contracted. I have come with some hesitation to the conclusion that there is not enough to deprive the suppliants of their right under a petition appointed by the Crown to be heard in the English Courts, to a remedy against British revenue. It may be that in this or other cases the relevant enactments enable the British Government to claim over against the Irish Government the sums they pay to the suppliants; but we cannot decide this in the absence of the Irish Government. The matters that have chiefly influenced me are the points (1.) that there is in this case no contractual right or liability of a department or its officer to be transferred, or (2.) any named party to a contract for whom an Irish department or officer can be substituted, (3.) that the word "successors" by itself without more is not enough to transfer rights or liabilities if any, and (4.) that there are no clear words depriving the suppliants of the benefit of the source to which they could originally look for compensation. I limit this decision to the present case, as there may be pending contracts to which, at any rate, some of the above objections do not apply. On one point apparently raised I am clear—namely, that the right of the suppliants, against whomsoever it exists, is only one to

reimbursement after the suppliants have done the work of replacement, not a right that the other party to the agreement shall replace the rails. There must be a declaration as to liability on the lines of this judgment, the appeal being allowed with costs here and below.

Appeal allowed.

Solicitors for the appellants: *Peacock & Goddard.*
Solicitor for the Crown: *Treasury Solicitor.*

J. F. C.

BUTWICK *v.* GRANT.

1924
March 13, 14.

Principal and Agent—Authority of Agent—Extent of—Express Authority to sell Goods—Implied Authority to receive Payment of Price.

Authority to an agent to sell goods does not of necessity imply authority to receive payment of the price.

Drakeford v. *Piercy* (1866) 7 B. & S. 515 followed.

Anon (1698) 12 Mod. 230 disapproved and not followed.

Capel v. *Thornton* (1828) 3 Car. & P. 352; and *Howard* v. *Chapman* (1831) 4 Car. & P. 508 explained and distinguished.

APPEAL from Bloomsbury County Court.

The plaintiff, Hyman Butwick, was a wholesale dealer carrying on business in London. The defendant, E. Grant, was a tradesman at Southend-on-Sea. In the end of March, 1923, one Chait, who had done business with the defendant, but whom the plaintiff had not previously met, called upon the plaintiff and told him that the defendant was a client of his who would probably do business with the plaintiff. The plaintiff made inquiries about the defendant and was satisfied as to his financial position. The plaintiff then authorized Chait to sell to the defendant sixty-four sports coats and gave him one of them as a sample. Shortly afterwards Chait offered the coats to the defendant, who agreed to buy them, taking and paying for the sample coat. A few days later the plaintiff despatched the coats to the defendant, and sent him by post an invoice which bore the name of the plaintiff. Then Chait again called on the

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defendant, who in good faith paid him the price of the coats and got from him a receipt for the money. Chait failed to pay the plaintiff.

The plaintiff then brought the present action against the defendant in the county court for the price of the coats thus sold and delivered.

It was stated in evidence by and on behalf of the plaintiff that Chait had no authority from him to receive payment of the price of the goods from the defendant. It was stated by Chait that he took the money from the defendant as the plaintiff's agent and intended to hand it to the plaintiff, but got into financial difficulties and was unable to do so.

The county court judge found that Chait was not the plaintiff's traveller, and that this was the only occasion on which he sold or was employed to sell goods of the plaintiff; that when the defendant agreed to buy the goods he knew that Chait was, at least probably, selling them not as his own or as principal, but as agent for and on behalf of some other person, and that the plaintiff in fact gave Chait no authority to sell the goods as his own or as principal; and he held that Chait had no actual authority to receive payment for the goods as stated by him, and that the fact of his being authorized to sell these particular goods on this occasion did not in itself confer or raise any implication of authority to receive payment, and that he had not in the circumstances either implied or apparent authority in that behalf; and he gave judgment for the plaintiff.

The defendant appealed.

F. Hinde (*A. C. D. Jackson* with him) for the defendant, appellant. The learned county court judge was wrong in giving judgment against the defendant for the price of the goods sold and delivered. The defendant paid the price to Chait and in so doing he paid it to the plaintiff. Chait had authority to receive payment of the price on behalf of the plaintiff. The plaintiff appointed Chait his agent for the purpose of selling the goods. An agent having authority to sell goods has in the absence of any indication of a contrary

intention authority to receive payment of the price. That proposition can be supported both on principle and authority. As to the legal principle, the proposition follows from the considerations that a person who appoints another his agent to sell must be taken to give him authority to complete the transaction of sale in all its parts, and an essential part of the completion of the transaction is the receiving of the price. As to the authorities, the proposition is supported by the cases of *Anon* (1); *Capel* v. *Thornton* (2); and *Howard* v. *Chapman*. (3) There were here no circumstances showing any intention that the general rule should not apply. On the contrary, the circumstances showed that the plaintiff held out Chait to the defendant as having authority to receive the price on behalf of the plaintiff. That being so, no private instruction by the plaintiff to Chait would prevent the act of the latter in receiving payment from binding the plaintiff: see per Lord Blackburn in *National Bolivian Navigation Co.* v. *Wilson*. (4) Until the plaintiff gave sufficient notice to the defendant that Chait had no authority to receive payment of the price, the defendant had a right to assume that in paying Chait he was paying the plaintiff: *International Sponge Importers, Ld.* v. *Watt & Sons*. (5) As between the plaintiff and the defendant it was the plaintiff who put confidence in Chait and enabled him to make default, and he ought therefore to sustain the loss: see *Lickbarrow* v. *Mason*. (6)

Eric L. Sachs for the plaintiff, respondent. Though the plaintiff appointed Chait his agent with authority to sell the goods, Chait had no authority to receive payment of the price of the goods. The proposition that an agent having only a bare authority to sell has no authority to receive payment of the price is clearly established by *Drakeford* v. *Piercy*. (7) That case was not cited in *Cooke* v. *Eshelby* (8) nor apparently in any other case: at all events it has never

(1) 12 Mod. 230.
(2) 3 Car. & P. 352.
(3) 4 Car. & P. 508.
(4) (1880) 5 App. Cas. 176.
(5) [1911] A. C. 279.
(6) (1787) 2 T. R. 63.
(7) 7 B. & S. 515.
(8) (1887) 12 App. Cas. 271.

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been disapproved or even questioned in any subsequent case. The proposition is also supported by *Pratt* v. *Willey* (1), and it is involved in the principle of *Baring* v. *Corrie* (2); *Semenza* v. *Brinsley* (3), and *Cooke* v. *Eshelby* (4), which decide that where an agent sells goods without disclosing the principal he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the agent to him against the principal.

The cases cited on behalf of the defendant are distinguishable from the present case. In the present case the transaction in question was the only one in which the plaintiff had employed Chait; the plaintiff constituted Chait his agent with a bare authority to sell and to do nothing more; the plaintiff did not put Chait in possession of the goods or of any indicia of title thereto; at the time when the defendant bought the goods he knew that Chait was selling as agent, and he was therefore put upon his inquiry as to the extent of Chait's authority; and before the defendant paid Chait he had received an invoice from the plaintiff which showed that the plaintiff was the principal in the transaction. The case of *Anon* (5) lays down a large proposition, but the report of it is very short, and it is to be observed that neither in the English Reports nor in the Empire Digest is any case mentioned as having followed that case. *Capel* v. *Thornton* (6) is distinguishable, because in that case there had been a long course of dealing between the parties; it was not proved that the defendant knew that the person with whom she was dealing was only an agent; the agent was in possession of the goods; and the defendant did not receive any intimation from the plaintiffs that they were the sellers until after she had paid the agent. *Howard* v. *Chapman* (7) is distinguishable, because there the agent was the regular traveller of the plaintiff, and therefore presumably authorized to receive payment of

(1) (1826) 2 Car. & P. 350.
(2) (1818) 2 B. & Al. 137.
(3) (1865) 18 C. B. (N. S.) 467.
(4) (1887) 12 App. Cas. 271.
(5) 12 Mod. 230.
(6) 3 Car. & P. 352.
(7) 4 Car. & P. 508.

the price of the goods from the plaintiff's customers. Moreover, in that case the general question now raised was not argued. In *International Sponge Importers, Ld.* v. *Watt & Sons* (1) there had been a previous course of dealing between the parties, the agent was the traveller of the plaintiffs, and he was in possession of the property.

HORRIDGE J. In this case the plaintiff employed one Chait as his agent to sell a quantity of sports coats, and gave him one of them as a sample. Chait went to the defendant, who gave him an order for a number of coats, at the same time taking and paying for the sample coat. A few days later the plaintiff sent the rest of the coats to the defendant with an invoice bearing the plaintiff's name. In the transaction of sale the plaintiff was the principal, Chait acting as his agent. Chait afterwards collected the price of the goods from the defendant, but did not pay the money to the plaintiff. The plaintiff then brought this action against the defendant for the price of the coats. The learned county court judge held that Chait had no actual authority to receive payment for the goods, that the fact of his being authorized to sell these particular goods on this occasion did not in itself confer or raise any implication of authority to receive payment, and that he had not in the circumstances of the case either implied or apparent authority in that behalf; and the judge gave judgment for the plaintiff. Against that judgment the defendant now appeals.

In order to entitle us to interfere with that decision of the county court judge we must be satisfied that it has become a rule of law that where an agent has been invested with a bare authority to sell, he has also authority to receive payment of the price. We must also be satisfied that in this case there were no special circumstances preventing the application of that general rule.

Is there any such rule of law as that which I have mentioned? It is true that in the case of *Anon* (2) Lord Holt C.J. is reported to have said: "He who has power to

(1) [1911] A. C. 279. (2) 12 Mod. 230.

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sell, has power to receive the money." That statement, however, assuming it to have been made, is of too general a character to be in accordance with the later decisions. In *Capel* v. *Thornton* (1) Lord Tenterden C.J., referring to the agent whom the plaintiffs had authorized to sell goods on their behalf, said: "if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary), an implied authority, to receive the proceeds of such sale." That statement, however, is applicable only to the facts of that particular case and not as a general proposition. In *Howard* v. *Chapman* (2) counsel for the defendant having contended that a traveller authorized to take orders was also authorized to receive payment even in goods, Tindal C.J. is reported to have said: "Yes, payment in money, but not in goods." That statement must be taken to have been made in regard to the particular facts of that case, in which the agent was the regular traveller of the plaintiff.

The case which deals with the matter most clearly is *Drakeford* v. *Piercy*. (3) In that case the plaintiff sold goods by his agent to the defendant and the defendant paid the agent, who did not account to the plaintiff for the money. In an action by the plaintiff against the defendant for goods sold and delivered, the defendant pleaded that he purchased the goods of the person with whom he dealt, not as the agent of the plaintiff, but as the seller on his own account, that he had no notice or knowledge that that person was an agent until after he had paid for the goods, and that he paid for them bona fide believing that that person was the seller on his own account, and entitled to receive payment; and the Court held that that plea was no answer to the plaintiff's claim. In that case, after counsel for the defendant had referred to the observation of Lord Tenterden already mentioned to the effect that an agent having authority to sell goods has an implied authority to receive the price, Blackburn J. said that that would be right in regard to the particular class of agents there referred to "but is not

(1) 3 Car. & P. 352. (2) 4 Car. & P. 508, 509.
(3) 7 B. & S. 515.

generally true." (1) The best statement of the law on this point is to be found in the judgment of Lush J., in that case, in the course of which he said (2): "The facts stated in the plea may perhaps afford prima facie evidence to be submitted to a jury under the plea of payment, and justify a verdict for the defendant on it; but that an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority." How can we in the face of these statements say that in the circumstances of the present case the county court judge should have held that the agent had authority to receive payment of the price of the goods?

Assuming, however, that the rule of law alleged on behalf of the defendant did exist, I am further of opinion that there were here special circumstances which prevented its application. Chait was not the plaintiff's traveller, and this was the only occasion on which he had sold goods on behalf of the plaintiff. Further, the defendant knew that Chait was selling the goods not as principal but as agent for some other person, and was put upon inquiry as to the scope of Chait's authority.

In my opinion there is no hard and fast rule of law that an agent employed to sell has power to receive the price, and even if there were it was prevented by the special circumstances from applying to this case. I therefore think that this appeal should be dismissed.

SANKEY J. I agree. I found my judgment upon that of Lush J. in *Drakeford* v. *Piercy*. (3) He there said: "that an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority." In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the seller's agent to show, and in the absence of any reason to the contrary he would

(1) 7 B. & S. 517. (2) Ibid. 522.
(3) Ibid. 515, 522.

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be entitled to succeed on showing, either that the agent had actual authority to receive payment, or that he had ostensible authority to receive payment, or that he had a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question. In the present case the county court judge has found that no authority of any of these descriptions was shown to have been possessed by the agent.

Appeal dismissed.

Solicitors for appellant: *Bentley & Jenkins, for D. G. Verney, Southend-on-Sea.*

Solicitors for respondent: *Windsor & Brown.*

J. R.

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July 3.

BIDDLE *v.* MORRIS.

Revenue—Income Tax—Property Tax—Annual Value—Permitted Increase for Repairs—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, Nos. I., V., r.* 7 (*b*)—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*d*).

Where, in the case of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, the landlord increases the standard rent, under s. 2, sub-s. 1 (*d*), of the Act, by an amount in respect of repairs, that increased amount is part of the rent for the purposes of assessment to income tax under Sch. A of the Income Tax Act, 1918, and is not a mere indemnity for the increased cost of repairs.

CASE stated by General Commissioners of Income Tax.

Frank Biddle (hereinafter called "the appellant") appealed against an assessment of 21*l.* to income tax under Sch. A for the year ending April 5, 1924, in respect of premises in Birmingham, of which he was the owner.

The premises were a dwelling house, the annual value of which, on a revaluation for the year ending April 5, 1924, for the purposes of Sch. A, was fixed at 21*l.* gross and 15*l.* 15*s.* net. During the year ending April 5, 1923, the

premises were let, and they continued to be let, at 8*s.* 5*d.* per week on a weekly tenancy, the landlord being responsible for repairs, and the tenant for rates. The rent of 8*s.* 5*d.* was arrived at as follows: Six shillings the net rent, 10¾*d.* the increase of 15 per cent. permitted under s. 2, sub-s. 1 (*c*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and 1*s.* 6*d.*, the increase of 25 per cent. permitted in respect of repairs under s. 2, sub-s. 1 (*d*), of the said Act. For many years before April 5, 1923, the premises were assessed to income tax under Sch. A on a gross assessment of 15*l.*, which, for the purposes of collection, was reduced by one-sixth, leaving a net assessment of 12*l.* 10*s.*

The appellant contended that the gross annual value of the premises for the purposes of Sch. A was the net rent, plus the increase of 15 per cent. permitted by s. 2, sub-s. 1 (*c*), of the Act of 1920, and that the increase of 25 per cent., permitted by s. 2, sub-s. 1 (*d*), of that Act, receivable by him was no part of the annual value, but was a mere payment in consideration of the statutory obligation to repair imposed upon him.

The respondent (the Inspector of Taxes) contended that the increased amounts which a landlord was entitled to demand from a tenant by virtue of the Act of 1920 were rent, and that the assessment of the premises at 21*l.* represented the true annual value of the premises in question.

The Commissioners dismissed the appeal and confirmed the assessment.

William Allen for the appellant. For the purpose of Sch. A "the annual value shall be understood to be (i.) the amount of the rent by the year at which [the premises] are let, if they are let at rackrent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding April 5 next before the time of making the assessment": Income Tax Act, 1918, Sch. A, No. I., General Rule. In this case the rent was not fixed by agreement, but by force of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That Act restricts the amount of

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rent which a landlord can demand, and authorizes increases only within defined limits. In this case the rent was increased by 15 per cent. under s. 2, sub-s. 1 (*c*), of the Act of 1920, and by 25 per cent. under s. 2, sub-s. 1 (*d*), of the same Act. The latter addition is in respect of repairs and is in no sense part of the rent, but is a mere indemnity given to the landlord in respect of the increased cost of repairs. There was no need in s. 2, sub-s. 1, of the Act to split up the percentages in the way that has been done if the percentage addition for repairs was not to be an indemnity only. The true market value of premises, which is the test, is the amount which the landlord can put in his own pocket.

Sir Henry Slesser S.-G. and *R. P. Hills* for the respondent. For the purpose of assessment under Sch. A, as for rating, the actual conditions affecting the hereditament at the time the valuation is made have to be taken: see per Lord Buckmaster in *Poplar Assessment Committee* v. *Roberts*. (1) In this case the landlord increased the rent by 25 per cent. under s. 2, sub-s. 1 (*d*), and the increase was demandable whether he did repairs or not. He in fact received the standard rent plus that increase, and therefore it has to be taken into account in arriving at the annual value of the premises.

Allen in reply. *Poplar Assessment Committee* v. *Roberts* (1) had relation to rating in the metropolis and has no bearing on the present case.

ROWLATT J. In my judgment this appeal fails. Under Sch. A the owner of premises is taxable on their annual value, that is the amount they are worth let by the year, he paying for repairs (for there is a deduction in respect of those, which reduces the amount on which he actually has to pay tax to the amount he may be supposed to receive). I need not go into the question which may or may not be decided for the purpose of income tax by *Poplar Assessment Committee* v. *Roberts* (2), because it is not sought in this case to carry the valuation beyond the basis of the Rent Restrictions Act.

(1) [1922] 2 A. C. 93, 103. (2) [1922] 2 A. C .93.

The question is whether, when in addition to the standard rent the landlord is permitted by the Rent Restrictions Act, 1920, to demand an increase of 25 per cent. if he is to do the repairs, that increase is to be treated as part of the rent or is to be treated as an indemnity to him outside the rent altogether. In my view that 25 per cent. increase must be treated as part of the rent. If the landlord does not require to spend that amount on repairs it does not make any difference—he receives the full amount; if he has to spend more he can get no more from the tenant. This increase is not an indemnity against the landlord's liability for repairs; it is an increase of rent which he is allowed to make, because being under a covenant to repair he must be allowed to exercise a little more freedom than is permitted him under the Rent Restrictions Act. Of course, on the figures it may be hard on the landlord that he is allowed to add 25 per cent. to the standard rent, but is allowed to deduct only one-fourth of that amount for taxation. If the 25 per cent. represents the actual cost of repairs the figures may work out hardly for him, but if that is so it is because the statutory allowance in respect of repairs is not fixed high enough.

Appeal dismissed.

Solicitors for appellant: *McKenna & Co., for Philip Cohen, Slater & Tompkins, Birmingham.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. S. H.

Considered. DALE v. I.R. COMRS. [1951] 2 All E.R. 517.

Distinguished. DALE v. INLAND REVENUE COMMISSIONERS [1951] Ch. 893

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July 3.

BAXENDALE *v.* MURPHY.

Revenue—Income Tax—Assessment—Remuneration of Trustee—"Annual payment . . . . wholly out of profits or gains brought into charge"—Employment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case II.; All Schedules Rules, r.* 19.

followed. DALE v. INLAND REVENUE COMMRS. [1952] 1 Ch. 704

The appellant was appointed a trustee under a deed of settlement, by the terms of which he was entitled to remuneration for his services at the rate of 100*l.* per annum, that remuneration being payable out of the income arising from the trust funds:—

Held, that the sum of 100*l.* was an "annual payment" payable wholly out of profits or gains brought into charge to tax within r. 19 of the All Schedules Rules in the Income Tax Act, 1918, and was not a payment in respect of an employment so as to be the subject of direct assessment under Sch. D, Case II.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners Captain Guy Vernon Baxendale (hereinafter called "the appellant") appealed against assessments to income tax under Sch. D—namely, 75*l.* for the year ending April 5, 1919, and 100*l.* for each of the years 1920, 1921 and 1922 paid to him for his services as a trustee of the funds comprised in an indenture of settlement.

By the settlement in question the appellant and another were appointed trustees, and it was provided that certain investments should be held by them on the trusts relating to the capital and income thereof as therein stated. The settlement provided that each of the said trustees, and every other trustee for the time being, should be entitled to remuneration for his services at the rate of 100*l.* per annum, and such remuneration was to be paid by the trustees out of the income arising from the trust funds in their hands. The settlement further provided that any trustee being a solicitor or other person engaged in a profession or business was to be entitled to be paid his usual professional charges.

In paying to the appellant his remuneration for each of the years in question the trustees deducted from the full amount of 100*l.* the income tax applicable thereto upon the ground that the payments were "annual payments" within

r. 19 of the All Schedules Rules in the Income Tax Act, 1918. (1)

It was contended for the appellant that as the remuneration at the rate of 100*l.* per annum was payable out of the income of the trust fund from which income tax was deducted at source, the remuneration was an "annuity" or "annual payment" "payable wholly out of profits or gains brought into charge to tax" within the said r. 19, and that the trustees in paying the remuneration had properly deducted therefrom as provided by that rule income tax at the rate in force during each of the years in question.

The respondent (the Inspector of Taxes) contended (*a*) that the payments to the appellant represented remuneration for his services as trustee and were not in the nature of "yearly interest of money, annuity or other annual payment," and that neither the provisions of Sch. D, Case III., r. 1, nor the said r. 19 applied, and (*b*) that the said remuneration was properly chargeable by direct assessment upon the appellant under Sch. D, Case II. (2)

(1) Income Tax Act, 1918, All Schedules Rules, r. 19 (1.): "Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

"The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

(2) Income Tax Act, 1918, Sch. D, Case II.: "The tax shall extend to every employment by retainer in any character whatever, whether such retainer shall be annual or for a longer or shorter period, and to all profits and earnings of whatever value arising from employments, and shall be computed on the full amount of the balance of the profits, gains and emoluments of the professions, employments or vocations upon a fair and just average of three years. . . . ."

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The Commissioners were of opinion that as the appellant's remuneration was payable to him for acting as a trustee of the settled fund he was liable to direct assessment under Sch. D, Case II., and they therefore increased the assessment for the year ending April 5, 1919, from 75*l.* to 100*l.*, and confirmed the assessments for the other years.

Raymond Needham for the appellant. The sum of 100*l.* payable to the appellant under the settlement is an "annuity" or "annual payment" payable wholly out of profits or gains brought into charge to tax within r. 19 of the All Schedules Rules of the Income Tax Act, 1918. The appellant is therefore not liable to be charged by direct assessment on the annuity or annual payment. It is contended for the respondent that r. 19 has no application, because, as is said, the appellant receives the 100*l.* in respect of an employment. This is not so. A trustee, as such, has no "employment" within the meaning of the Income Tax Act. He has no employer. Moreover, the so-called remuneration for services is not really remuneration for services. This is clearly so in the case of a trustee under a will, in which case the trustee takes as a beneficiary: *In re Thorley* (1) and *In re White* (2); and there is no essential difference in this respect between a trustee under a will and a trustee under a settlement. Moreover, even if the annuity were in any real sense remuneration for services it would not cease to be an annuity from which tax could be deducted under r. 19.

[He also cited *Brooke* v. *Price*. (3)]

Sir Henry Slesser S.-G. and *R. P. Hills* for the respondent. By the settlement onerous duties are imposed upon the appellant and his co-trustee, and the performance of those duties is expressed to be paid for by the remuneration of 100*l.* a year. Work which involves the carrying out of those onerous duties is a trade, employment or vocation within Sch. D, Case II., and the appellant is therefore directly assessable on the 100*l.* The case of a solicitor who under the terms of a will is entitled to charge profit costs against

(1) [1891] 2 Ch. 613, 624. (2) [1898] 2 Ch. 217.
(3) [1917] A. C. 115, 126.

the estate is given the opportunity of earning money, but the money when earned is liable to tax under Sch. D. The only difference between such a case and the present is that in this case the amount the appellant is entitled to charge is fixed at 100*l*.

No reply was called for.

ROWLATT J. This appeal must be allowed. The appellant received 100*l*. a year as trustee under and by virtue of the deed of settlement, and he was taxed on that as an "annual payment" under r. 1 (*a*) applicable to Case III., Sch. D. That being so it is an "annual payment" payable out of profits or gains charged to tax within the meaning of r. 19 of the All Schedules Rules. It is said for the respondent that it is not an annual payment within that rule, but is a sum earned by the appellant every year just as a man might earn a fee from a client each year in the course of his profession. That contention is based upon an entire misconception of the position. It is said that the deed recites that the appellant agreed to be a trustee. Of course he did, or he would not have been appointed, but he was not making a bargain with the parties to the deed that he should enter into his own employment as trustee and pay himself as trustee. Such a position is unthinkable. The Commissioners have been misled by the use of the word "remuneration," which merely indicates why it was desired to give the appellant something for his trouble. If one wants to see exactly how this case stands it is only necessary to look at the observations of Lindley L.J. in *In re Thorley*. (1)

Appeal allowed.

Solicitors for appellant: *Clarke, Square & Mills.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1891] 2 Ch. 613, 624.

J. S. H.

1924
July 8.

ATTORNEY-GENERAL *v.* LANE FOX.

Revenue—Estate Duty—Property deemed to pass on Death—Cesser of Annuity charged on Estate—Person entitled in "remainder or reversion"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*)—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 11, *sub-s.* 1—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 59, *sub-s.* 1.

By his will G. L. F., who died in 1896, charged his real estate with an annuity of 1000*l.* for his daughter M. for her life, and, subject thereto, devised his real estate to his son J. in fee simple. J., who died in 1906, leaving his sister M. surviving, devised his real estate to his son, the defendant, in fee. On his father's death in 1906 the defendant paid estate duty on the full value of the real estate devised to him less only a deduction therefrom of the value calculated according to the succession duty tables of an annuity of 1000*l.* for the life of M., who was then aged sixty-four. By deed dated February 11, 1922, M. released and extinguished her annuity, and on November 26, 1922, she died. Thereupon the Crown claimed from the defendant, by virtue of s. 11, sub-s. 1, of the Finance Act, 1900, estate duty on the property to the extent to which a benefit accrued by reason of the cesser of the annuity:—

Held, that estate duty was not payable on the cesser of the annuity, inasmuch as M. had not an interest in the property ceasing on her death, and the defendant was not a "person entitled to an estate or interest in remainder or reversion in such property" within s. 11, sub-s. 1, of the Finance Act, 1900.

INFORMATION on behalf of the Crown.

By his will dated October 30, 1888, George Lane Fox of Bramham, Tadcaster, in the county of York, after charging his estates in certain parishes in that county with the payment of a capital sum in favour of his eldest son George Sackville Frederick Lane Fox, gave to his (the testator's) daughter Marcia Lane Fox an annuity of 1000*l.* so long during her life as she should remain unmarried, and he charged all his estates in Yorkshire with the payment of that annuity, and the testator devised all his real estates, subject to a term, to the use of his son James T. R. Lane Fox his heirs and assigns for ever.

George Lane Fox died on November 2, 1896, without having, so far as material, revoked his will.

By his will dated May 7, 1897, the said James T. R. Lane Fox devised all his freehold estates to his son, the defendant, George Richard Lane Fox and his heirs and assigns

absolutely, subject to certain life interests in part thereof of the testator's widow, and a portions fund for the testator's younger children.

The said James T. R. Lane Fox died on February 26, 1906, without having revoked or altered his will.

The said Marcia Lane Fox was still living at the death of the said James T. R. Lane Fox, and upon his death estate duty was paid upon the real estate devised to him by his father's will, but from the principal value thereof there was deducted the sum of 8524*l.* 10*s.*, being the value calculated according to the succession duty tables of an annuity for 1000*l.* for the life of the said Marcia Lane Fox, then aged sixty-four.

By indentures dated December 17, 1910, and January 17, 1921, Marcia Lane Fox released certain of the lands charged with her annuity, and by indenture dated February 11, 1922, she released the rest of the hereditaments so charged, extinguishing her annuity.

The said Marcia Lane Fox died on November 26, 1922.

The information alleged that the said Marcia Lane Fox had an interest ceasing on her death in the property devised by the will of her father charged with the payment of the said annuity, that estate duty became payable upon such property to the extent to which a benefit accrued by the cesser of that interest, that the value of such benefit was, by virtue of s. 7, sub-s. 7 (*b*), of the Finance Act, 1894, the principal value of an addition to the property equal to the income to which the said Marcia Lane Fox's interest extended, that is to say, a sum ascertained by capitalizing the annuity at the same number of years' purchase as that at which the rental of the property as a whole would be capitalized for ascertaining the value of the property as a whole, and that the defendant was accountable for the duty which by virtue of s. 11, sub-s. 1, of the Finance Act, 1900, and s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910, was exigible as would be exigible if the three indentures by which the said Marcia Lane Fox purported to release the hereditaments charged with her annuity had not been executed.

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The information prayed a declaration that on the death of Marcia Lane Fox estate duty became payable on the property charged with her annuity to the extent to which a benefit arose by the cesser of that annuity.

By his answer the defendant said that the said Marcia Lane Fox did not have an interest ceasing on her death in the property devised by her father's will and thereby charged with the annuity of 1000*l.*, since that annuity and any interest in the property she ever had ceased before her death. He denied that s. 11 of the Finance Act, 1900, had any application. He further said that if, notwithstanding the determination in fact of the annuity during her life, the Court should be of opinion that estate duty was exigible on her death in respect of the benefit accruing by reason of the cesser of the annuity to the property formerly charged therewith, he having in fact paid, on the death of his father James T. R. Lane Fox in 1906, estate duty as assessed on the principal value of the property charged with the annuity under deduction of only the then actuarial value of the annuity considered as an annuity for the life of a person then aged sixty-four, he had prepaid all estate duty that would become exigible on the death in 1922 of the said Marcia Lane Fox in respect of all benefit arising from the cesser of the annuity, and that by the information the Attorney-General was endeavouring to exact double duty in respect of the benefit so arising.

Alternatively the defendant said that the annuity was a rentcharge issuing out of the property of which he became seised in fee simple in possession on the death of his father; that it was an incumbrance within the meaning of the Finance Acts; and that on his father's death in 1906 the Inland Revenue Commissioners, for the purpose of estate duty, should have allowed as a deduction from the principal value of the property charged with the annuity not what in fact they allowed—namely, the then actuarial value of an annuity of 1000*l.* for the life only of a person then aged sixty-four—but the value of a perpetual annuity of 1000*l.* upon the basis that the incumbrancer, the said Marcia Lane Fox, who was

then living, must afterwards die, that on cesser of her annuity a benefit would arise, which would be measured according to s. 7, sub-s. 7 (*b*), of the Finance Act, 1894, and that by reason of his having paid estate duty in 1906 on the value of the property then charged with the annuity less only the deduction then actually allowed he had paid a far larger sum than was then exigible, which excess of duty, with allowance for interest, exceeded the amount of all duty exigible by reason of the cesser of the annuity, that all such duty must accordingly be deemed to have been paid in advance, and that in any event the Attorney-General ought not to be allowed to exact such duty without the previous repayment of the excess amount so paid with interest thereon.

J. E. Harman (*Sir Patrick Hastings A.-G.* with him) for the Crown. By s. 1 of the Finance Act, 1894, estate duty is payable upon the principal value of all property passing on the death of any person dying after the commencement of the Act; and by s. 2, sub-s. 1 (*b*), property passing on the death of the deceased is deemed to include "property in which the deceased . . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." It might be thought that this provision was sufficient to cover the present case, the interest of Marcia Lane Fox ceasing on her death. It was decided, however, in *Attorney-General* v. *Beech* (1) that where the tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest, and by a subsequent deed surrendered her life interest "to the end and intent that such life interest may merge in the interest in remainder of" her son, the property did not pass on the death of the tenant for life to the remainderman within the Finance Act, 1894, s. 1 or s. 2, sub-s. 1 (*b*), and therefore estate duty was not payable by the remainderman. Then came the Finance Act, 1900 (2), s. 11 of which was clearly intended to bring

(1) [1899] A. C. 53.

(2) Finance Act, 1900, s. 11, sub-s. 1:— "In the case of every person

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such a case as that dealt with in *Attorney-General* v. *Beech* (1), and in the present case within the scope of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. In substance s. 11 enacts that a person who comes after a limited interest and benefits by its surrender is entitled in reversion, and, as such, is liable to pay duty on the interest that passes to him. It cannot be supposed that the draftsman of the section meant to leave out such a case as this.

With regard to the point raised by the defendant's answer, that a larger amount of duty was paid on the death of James T. R. Lane Fox than was then exigible: the amount deducted from the principal value of the estate in respect of the annuity was rightly calculated on an actuarial basis: *Lord De Freyne* v. *Inland Revenue Commissioners.* (2) Moreover, there were two deaths and two passings of properties. On the death of James T. R. Lane Fox the whole property passed subject to the annuity, and on the death of the annuitant what passed to the defendant was the value of the cesser of the annuity.

W. A. Greene K.C. and *F. E. Farrer* for the defendant. In construing s. 11 of the Act of 1900, the general rule that taxing Acts are to be read strictly and that words are to receive their natural meaning—*Partington* v. *Attorney-*

dying after March 31, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was bona fide made or effected twelve months before the death of the deceased, and bona fide possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise."

Sect. 59, sub-s. 1, of the Finance (1909–10) Act, 1910, substitutes for the words "twelve months" in the foregoing section the words "three years."

(1) [1899] A. C. 53.

(2) [1916] 2 I. R. 456.

General (1); *Attorney-General* v. *Beech* (2)—has to be borne in mind, and, further, in approaching the construction of such Acts regard cannot be had to what one might expect to find; the words used can alone be considered: *Nevill* v. *Inland Revenue Commissioners.* (3) Sect. 11 was passed not in consequence of *Attorney-General* v. *Beech* (2), but in consequence of *Attorney-General* v. *De Préville.* (4) There the tenant for life of settled property released his life interest in favour of the remainderman and died within twelve months of that release. It was said on behalf of the Crown that notwithstanding that release estate duty was payable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, but that contention was held to be erroneous, for, as was said, the property to be brought into account was the property that actually passed. To meet that decision s. 11 was passed. In effect that section is tacked on as a new sub-section to s. 2, sub-s. 1, of the Act of 1894, as dealing with a new subject matter. The draftsman chose apt words in dealing with the surrender of life interests in land. The section contemplates a person having an estate in, and possession and enjoyment of, property, and another person being interested in remainder or reversion, and that on the cessation of the first person's interest by assurance, surrender, etc., the second person immediately under such surrender, etc., assumes possession and enjoyment. How is it possible to say that the present case falls within the scheme of the section? Marcia Lane Fox was not in possession of "property." What she had was an annuity charged upon certain property in Yorkshire. Further, the words "interest in remainder or reversion" are words of art and are so used in s. 11, and the conception of a remainder or reversion excludes the idea of the remainderman or reversioner being in possession: see the definition of "remainders" and "reversion" in Termes de la Ley (ed. of 1641), pp. 236, 244; see also Challis on Real Property, 2nd ed., pp. 68 et seq. Here on the annuity ceasing, the defendant did not assume possession; he had it already.

(1) (1869) L. R. 4 H. L. 100, 122.
(2) [1899] A. C. 53, 57, 59.
(3) [1924] A. C. 385, 399.
(4) [1900] 1 Q. B. 223.

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A conveyancer reciting the title of James T. R. Lane Fox would have said that he was seised in fee simple in possession subject to the life rentcharge; he could not have recited that he was seised in remainder or reversion expectant on the rentcharge: see Key & Elphinstone's Precedents, 11th ed., vol. i., p. 487, recital No. 8.

On the second point: On the death of James T. R. Lane Fox the annuitant was still alive, and the question there was: What was the value of that which passed on the death? The Crown said, in effect, that the value was that of the fee simple less only the actuarial value of the annuity. Now, on the death of the annuitant, the Crown says that the value of the estate which the defendant has been enjoying is something quite different—namely, an estate which was subject to a perpetual annuity. The Crown cannot be heard to say that for the purpose of the second death the annuity is to be treated as a perpetual annuity, but for the first death as a terminable annuity. Again, nothing in fact passed on Marcia Lane Fox's death. The Crown's claim is based on s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and s. 11 of the Finance Act, 1900. But the benefit of the cesser of a life rentcharge can arise but once. What is the taxable subject matter on Marcia Lane Fox's death? Not the property itself on which her annuity was charged, but the extent of benefit to that property arising by cesser of the annuity: Finance Act, 1894, s. 2, sub-s. 1 (*b*); s. 7, sub-s. 7 (*b*). But in 1906 duty was paid on that benefit. The Crown is really claiming that the benefit of the cesser of an annuity for life can arise twice. In 1906 all the duty exigible by the Crown in 1922 was prepaid. Since the reign of Henry VIII. the subject can raise any equity against a Crown debt and that not only by way of defence but also by a cross-claim.

Harman replied.

ROWLATT J. In this case the question is whether, when an annuitant for life releases her annuity within three years of her death, the property on which the annuity is charged is deemed to pass on her death to the extent to which a benefit

accrues by reason of the cesser of the annuity. It is familiar ground that under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, the property would be deemed to pass on the death of the annuitant to the extent to which a benefit accrued by reason of the cesser of the annuity. It was held in *Attorney-General* v. *Beech* (1) that when an interest which would have ceased on death had been released during the life of the person entitled to it that prevented the property passing when the death of that person took place. The position would have been the same here—that is to say, the defendant would have been right but for s. 11 of the Finance Act, 1900, upon the construction of which the question in this case turns. The words of that section are certainly very difficult to apply to this case. In approaching the section it must be remembered, what has often been said, that taxing statutes are to be construed strictly; further, the observations of Lord Cave in *Nevill* v. *Inland Revenue Commissioners* (2) are to be borne in mind. He there said: "In construing a taxing Act regard must be had not to what one might expect to find in the Act but to the words of the Act themselves." In this case one might well expect to find a meaning which would support the contention of the Crown, but, as Lord Cave said, I must have regard only to the language of the Act itself. One further preliminary observation I desire to make. Mr. Harman contends that I ought to look at the substance of the enactment. I quite agree. But I must beware of saying that I am looking at the substance of the enactment when what I am really doing is to give effect to what I might expect to find in it. I must find in the Act something to support the substance, and then I can fairly read the words in accordance with the substance enacted. The words of the Act cannot be supplemented by what one might expect to find.

The history of the subject is briefly this: *Attorney-General* v. *Beech* (1) dealt with the case of a life interest which had been surrendered outside the time which makes a disposition futile for the purpose of escaping duty, and the

(1) [1899] A. C. 53. (2) [1924] A. C. 385, 399.

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argument for the Crown there was that where there are limitations by way of succession on death impressed upon property that impression cannot be deleted, but is inherent in the property, and if the life tenant surrenders his life estate to the remainderman he is to be treated as coming into it as passing on the death, and so the duty is not avoided. In the course of that argument it was held in terrorem over the Court that if the contrary of that was decided there would be no way of preventing duty being escaped, even when the surrender of the life interest was made within the period of one year of death or even in articulo mortis. But that point did not there arise, and it was held that if the life estate was surrendered and merged in the remainder there was no passing of property when the life dropped. In *Attorney-General* v. *De Préville* (1) the argument held in terrorem over the Court in *Attorney-General* v. *Beech* (2) arose for decision. There the surrender of the life estate was within three years of the death, and it was held that it was not liable to duty, because it did not come within s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. That decision was given in 1899, and in the following year s. 11 of the Finance Act, 1900, was enacted, and the argument for the present defendant is that the language of s. 11 is only apt to deal with surrenders of a life estate. That is what undoubtedly had been forced upon the attention of the revenue authorities in *Attorney-General* v. *De Préville.* (1) I may say that I should have expected to find that the whole question of life tenancies and annuities ceasing would have been fully dealt with when surrenders of interests were brought into line with gifts of property inter vivos. But I must have regard to the language of s. 11. That provides that "in the case of every person dying after March 31, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, ... be deemed to pass on the death of the deceased." Pausing there, Mr. Greene says that what

(1) [1900] 1 Q. B. 223. (2) [1899] A. C. 53.

is to be deemed to pass by virtue of the section is the property, in this case certain large estates in Yorkshire, and not an annuity, which is only an interest in property. I am not much impressed by that argument, although the wording of the section is curious. When the section says that the property shall be deemed to pass for the purposes of the Finance Act, 1894, one is referred back to that statute, where one finds that it is only deemed to pass to the extent of the benefit that accrues. But s. 11 continues: "notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property. . . ." It is said for the defendant that the section has no application to him, because a person entitled in fee subject to an annuity for life cannot be said to be a person entitled in remainder or reversion. I can see no escape from that argument. Mr. Harman contends that the owner in fee is entitled to the estate subject to this annuity and that on the cesser of the annuity he gets something—namely, the value of the annuity. The words used in s. 11 do not properly describe such a condition of things. We know what a "remainderman" is: he is a person who is not in possession; his estate is a future one; and he gets something which he had not already possessed when the event happens on which the property goes over. It is very difficult to see how the defendant comes within any fair meaning of the words "a person entitled . . . . in remainder or reversion." As to the annuity, it cannot be said to exist as a remainder or reversion in the property on which it is charged, for the defendant is already in possession of that property. I should therefore be doing the greatest violence to the language of the section if I were to accept Mr. Harman's argument. My view is strengthened by the further words of the section—namely, that the surrender to escape taxation must be made within twelve months (now three years) before the death, and that bona fide possession and enjoyment of the property must be assumed

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immediately upon the surrender. No language can be more apt than that to describe the action of a person who has released to him an interest which keeps him out of possession and enjoyment and who when the surrender is effected assumes possession and enjoyment of the property. Can it be said that a section framed in that way is applicable to the mere ceasing to pay an annuity charged on the estate of which the defendant already had the possession and enjoyment? I think not. Much as it surprises me, the Crown fails in the contention that the section applies to the present circumstances, and I therefore give judgment for the defendant.

With regret, I find myself debarred from entering upon any consideration of the second point.

Judgment for defendant.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Farrer & Co.*

J. S. H.

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July 15, 16, 30, 31.

FOOKS *v.* SMITH.

[1922. F. No. 777.]

Insurance (Marine)—Constructive total Loss of Goods—No Notice of Abandonment—Subsequent actual total Loss—Ordinary Sequence of Events—Liability of Underwriter for total Loss.

Where by a peril insured against there is a constructive total loss and no notice of abandonment is given, then, if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss, the underwriter is liable in respect of the total loss.

Goods on an Austrian ship bound to Bourgas were insured (inter alia) against loss by restraint of princes. In view of the imminent outbreak of war the Austrian Government issued general instructions to Austrian shipowners to put their ships in safety, and accordingly the above ship, by order of the owners, put into Trieste, and did not complete her voyage, the above goods being landed there:—

Held, that this was a constructive total loss caused by restraint of princes.

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No notice of abandonment was given. About a year later the Austrian Government requisitioned the goods and sold them, this being held to be an actual total loss.

Held, that as the confiscation was not an event which in the ordinary sequence of events followed the restraint of princes the underwriter was not liable for the total loss.

ACTION tried by Bailhache J.

The plaintiff, Daniel William Fooks, a hide merchant, sold certain parcels of hides to one Moscona, of Varna, a Bulgarian, under a contract dated April 22, 1914, which Bailhache J. treated as a c.f.i. contract. It provided for their shipment from Calcutta per steamer to Varna within about two months, insurance to be covered by the plaintiff. In or about May, 1914, the plaintiff shipped hides valued at 790*l.* from Calcutta to Bourgas by Austrian Lloyd steamship, and insured against marine risks. On July 31, 1914, in view of the imminence of hostilities the plaintiff took out a Lloyd's policy against war risks, the defendant William Sydney Smith being one of the underwriters. Among the perils insured against was restraints of princes. The ordinary course of transit was to convey the goods by ocean steamer to Trieste, and from thence by a coasting steamer to Bourgas. The goods arrived at Trieste on July 13, 1914, and were reshipped on the *Stambul*, an Austrian ship belonging to an Austrian subject. The *Stambul* left Trieste on July 30, and arrived at Valona on August 3, 1914. At Valona a telegram was received by the master from the owners, sent in consequence of general instructions issued by the Austrian Government to Austrian shipowners to get their vessels into a place of safety in anticipation of a declaration of war, ordering him to take the *Stambul* back to Trieste, which he did. Bailhache J. held that although no force was used, there was in fact a restraint of princes, as there was in the case of *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) War between Great Britain and Austria began on August 13, 1914. Between the middle and the end of September the hides were discharged at Trieste, and remained there for some time

(1) [1916] 1 A. C. 650.

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and were then sent up country, and ultimately, more than a year afterwards, in 1916, they were requisitioned by the Austrian Government and sold for a sum which, owing to the exchange, was negligible. These facts were not ascertained by the plaintiff until 1921, and in consequence he gave no notice of abandonment. The plaintiff then claimed under the war risks policy as for a total loss, or alternatively for a constructive total loss caused by a peril insured against—namely, restraint of princes.

Jowitt K.C. and *E. G. Palmer* for the plaintiff. If there is a loss through restraint of princes which could have been converted into a constructive total loss by giving notice of abandonment, and later an actual total loss supervenes, as in this case, then, although no notice of abandonment was given, there is a valid claim for a total loss: *Mellish* v. *Andrews* (1) and Arnould on Marine Insurance, 10th ed., vol. ii., ss. 1043, 1049. The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62, sub-s. 1, does not affect such a claim.

Le Quesne for the defendant. *Mellish* v. *Andrews* (1) does not cover this case. On August 3, 1914, when the *Stambul* was sent away from Valona to Trieste the adventure was frustrated and the policy ceased to be operative, so that no further loss was covered. In *Mellish* v. *Andrews* (1) it was not suggested that the adventure had been frustrated before the occurrence of the events upon which the claim was based. That case was decided in 1812, and the doctrine of frustration did not assume importance until after the decision in *Jackson* v. *Union Marine Insurance Co.* (2), and consequently one would not expect the doctrine to be noticed in the earlier case.

In cases where a claimant who has not given notice of abandonment has been held entitled to recover on a subsequent total loss it will be found that the final event was the normal development of the peril insured against. That is not the case here. By restraint of princes the *Stambul* was turned back at Valona, and a notice of abandonment would

(1) (1812) 15 East, 13. (2) (1874) L. R. 10 C. P. 125.

have made that a constructive total loss; but it was the requisitioning of the goods by the Austrian Government that caused the actual total loss. There was not that connection between the seizure and sale and the restraint of princes which is necessary. The principle was clearly laid down by Kelly C.B. in *Stringer* v. *English and Scottish Marine Insurance Co.* (1) It was not a natural consequence of the restraint of princes that the goods should be confiscated. The restraint and the confiscation were not part of one scheme, and in fact were divided by a considerable period of time. No attempt was made to put the goods into the Prize Court and thus to treat them as captured goods.

[*De Mattos* v. *Saunders* (2) was also referred to.]

The *Stambul* was not stopped by restraint of princes; there was only a general instruction by the Austrian Government to Austrian shipowners to put their ships in safety. The voyage was not illegal, as in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3)

E. G. Palmer in reply referred to *Cossman* v. *West.* (4)

BAILHACHE J., having stated the facts, continued:—The action came on for trial before me some little time ago, and I then came to the conclusion, as an interim opinion, that the underwriter was not liable as for a total or constructive total loss. The question was then raised whether, if it was neither a total nor a constructive total loss, it might be treated as a partial loss, and I directed that the matter should be argued from that point of view. I am glad that I did so, because although that particular point has not been pressed, I have heard a much fuller argument upon the former points, and I am much obliged to counsel on both sides for their assistance upon the question whether this was a total or a constructive total loss. No notice of abandonment was given, because the facts were not known, as far as the frustration of the adventure was concerned, for seven years, and as to the seizure and sale, for five years after the event, and it

(1) (1870) L. R. 5 Q. B. 599, 603.
(2) (1872) L. R. 7 C. P. 570, 579.
(3) [1916] 1 A. C. 650.
(4) (1887) 13 App. Cas. 160.

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could not be suggested that a notice of abandonment given seven years after the event could by any possibility be a good notice. I have now been referred to all the relevant authorities on the point I have to decide. I was not referred to any on the first occasion, the reason probably being that it is now the fashion in this Court to regard a trial as a preliminary skirmish in which small guns only are used, and to keep the heavy guns for the Court of Appeal or the House of Lords. However, on this occasion the heavy guns on both sides have been unmasked, and have fired many salvos.

As a preliminary point it was said that there was no restraint of princes. The Austrian Government gave general instructions to the owners of Austrian ships to get their vessels into a place of safety in anticipation of the declaration of war. No doubt the assured must prove that the particular peril relied upon happened, and I am bound to say that the proof of the happening of this particular peril is very slight indeed. No force was used; but behind the instructions of a Government there is always the ultimate resort to force if force be necessary. Therefore, as in *Sanday's Case* (1), I think there was a restraint of princes, and that in consequence thereof the vessel put back to Trieste.

It must be borne in mind that a policy on goods insures, or is intended to insure, their safe arrival at the port of destination mentioned in the policy. It is a policy of insurance on the adventure. If therefore the adventure is prevented by a risk named in the policy there is a claim on the underwriters. If the risk is of such a nature that the adventure is frustrated, but that the goods remain in safety and uninjured, there is a constructive but not an actual total loss, and in order that a person may be enabled to sue for a constructive total loss notice of abandonment is necessary as soon as there has been a reasonable opportunity for ascertaining the facts. I have come to the conclusion that with due diligence sufficient facts might well have been ascertained long before they were. When a peril insured

(1) [1916] 1 A. C. 650.

against happens and consequently a loss is incurred the underwriters' liability on the policy comes to an end, subject of course to their liability to pay in respect of the peril insured against which has occurred. Therefore, in order to recover on this policy it is necessary to show that the goods were lost in consequence of the restraint of princes. The goods remained in specie and were not seized by the Austrian Government for more than a year. At the end of that period the Austrian Government requisitioned the goods and sold them, and no doubt that requisitioning constituted an actual and not a constructive total loss. The price realized would by reason of the doctrine of subrogation belong to the underwriters.

Authorities have been cited which show that if there is first a constructive total loss followed by an actual total loss, and, no notice of abandonment having been given, the constructive total loss cannot be relied on, yet the insured may sue the underwriters in respect of the following actual total loss, and that is what the insured in this case seeks to do. It is said that the constructive total loss by the restraint of princes was turned into an actual total loss when the Austrian Government seized and sold the goods. *Mellish* v. *Andrews* (1) was cited in support of that proposition. That case was decided by Lord Ellenborough in 1812. The headnote, after dealing with the facts, says: "But though such notice [of abandonment] was too late, supposing an abandonment to be necessary; yet as the goods were finally seized and unladen by orders of that Government on April 30 following; it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment." To the same effect is *Stringer* v. *English and Scottish Marine Insurance Co.* (2) These two cases are authorities for the proposition that if a constructive total loss afterwards becomes an actual total loss the assured may in certain circumstances, although he has given no notice of abandonment, rely upon the actual total loss and recover, although there is a considerable interval

(1) 15 East, 13. (2) L. R. 5 Q. B. 599.

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of time between the actual total loss and the constructive total loss. To the same effect are some observations in the well-known judgment of Lord Abinger in *Roux* v. *Salvador*. (1)

As I understand the law, it stands in this way. Where by a peril insured against there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss—as, for instance, if there is a capture followed by confiscation—the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable. That is an illustration of the doctrine Proxima causa non remota spectatur.

Assuming that to be a correct statement of the law, I would refer to an observation of Willes J. in *De Mattos* v. *Saunders* (2): "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequences of a peril insured against." To the same effect is a passage in the judgment of Kelly C.B. in *Stringer* v. *English and Scottish Marine Insurance Co.* (3): "I am of opinion, that the decree for the sale of the goods and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever repossessing himself of the goods in specie, entitled the plaintiffs to treat the case as one of total loss. This loss of the goods arose, though not directly, out of the original capture (which was of itself, if it had been so treated, a total loss), through a series of consequences, viz., the institution, the different steps, and the continuance of the suit until the decree was pronounced; and the sale under the decree was—if I may use the expression—a completion of

(1) (1836) 3 Bing. N. C. 266, 287. (2) L. R. 7 C. P. 570, 579.
(3) L. R. 5 Q. B. 599, 603.

the total loss." Again, to the same effect is the judgment of the Privy Council in *Cossman* v. *West*. (1) The headnote says: "To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated." In that case it is to be observed that the same point was taken that the total loss must be in consequence of the peril insured against.

Now, was the total loss in the present case a necessary, or natural or direct consequence of the peril insured against? Of course it is true to say that the restraint of princes which brought these hides into Austria and kept them at Trieste is a sine qua non of the ultimate loss; if they had not been there the Austrian Government could not have seized them. But they came there at a time when this country was not at war with Austria, war being declared on August 13, 1914, and they came there because the Austrian Government did not desire Austrian ships to be in danger on the high seas. But the fact that they came there did not as a necessary, natural, or direct consequence lead to their ultimate seizure and requisitioning and sale by the Austrian Government. It seems to me that that seizure and sale was a nova causa superveniens, and was not the necessary and direct result of the restraint of princes. Suppose the goods had been destroyed by fire at Trieste, it would be impossible to say that an underwriter of the war risks policy was liable, for that destruction would not be a necessary or direct consequence of the frustration of the voyage. To the extent that the voyage in this case was frustrated, the extent of the constructive total loss, I think the underwriter would have been liable; but I do not think that the constructive total loss in this case ever became a total loss or a completion of the constructive total loss. The total loss was due, not to the

(1) 13 App. Cas. 160.

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fact that the voyage had been frustrated but to an entirely independent act of the Austrian Government, not at all sufficiently related to the original peril, the restraint of princes. In all the circumstances of the case, which is one of considerable difficulty, I think that these goods, so far as the actual total loss is concerned, were lost by the seizure and sale by the Austrian Government; that by the time the seizure and sale took place the policy had long since run off, and that the seizure and sale were not so nearly connected with the restraint of princes that I can hold that the total loss was a completion of what was begun by the restraint of princes.

I have therefore come to the conclusion that the assured cannot recover in this case, and that there must be judgment for the underwriter.

Judgment for defendant.

Solicitors for plaintiff: *Martin & Barry O'Brien.*
Solicitors for defendant: *Thomas Cooper & Co.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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April 7, 8, 9, 10, 11, 14, 15; *May* 16.

HARNETT *v.* BOND AND ANOTHER.

[1922. H. 2134.]

Lunacy Acts—Reception Order—Probation Order—False Imprisonment—Recapture—Subsequent Detention—Direct Consequence of unlawful Act—New Cause intervening—Justification—Act done in Pursuance of Statute—Lunacy Act, 1890 (53 *Vict.* c. 5), *ss.* 35, 55, 83, 330.

The plaintiff having been received into and detained as a lunatic in a house licensed by justices for the reception of lunatics under a reception order certified in accordance with s. 4 of the Lunacy Act, 1890, was granted leave of absence on trial for twenty-eight days. The order granting leave stated upon its face that it was revocable at any time during that period, and it purported to empower the manager of the licensed house to take back the plaintiff if his mental condition required it. On the second day of his leave he went to the office of the Board of Control and asked to see one of the Commissioners in Lunacy. The Commissioner after seeing him telephoned to the manager of the licensed house that the plaintiff was unfit to be allowed out on trial any longer and detained the plaintiff for two or three hours while the manager sent a motor and two attendants and took him back to the licensed house. Thereafter the plaintiff was detained in that house and in other institutions for lunatics from December 14, 1912, till he escaped on October 15, 1921. He then brought an action against the Commissioner and the manager charging them jointly and severally with false imprisonment.

Among numerous provisions in the Lunacy Act, 1890, guarding by means of visits and certificates against the improper detention of sane persons in institutions for lunatics, s. 83 imposes upon the manager of every licensed house the duty forthwith upon the recovery of a patient to send to the person on whose petition the reception order was made a notice stating that the patient unless removed in seven days will be discharged, and to discharge him if he is not removed within that time.

The case was tried before a judge and jury. The jury found that the plaintiff on the day when he was taken back was not of unsound mind or dangerous to himself or others and was fit to be at large; that the Commissioner alone caused him to be detained until the attendants came, and did so for the purpose of the plaintiff being detained at the licensed house; and that the manager honestly believed (1.) that the plaintiff was of unsound mind, and (2.) that it was in the plaintiff's interest that he should be taken back into confinement. They also found, but without evidence to support their findings, that the Commissioner did not honestly believe that the plaintiff was of unsound mind, and that he and the manager had not exercised reasonable care.

The judge directed the jury that they might in assessing the damages take into consideration the whole period of the plaintiff's detention

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up to October 15, 1921, if they thought it was the direct consequence of what the defendants did on December 14, 1912:—

Held, that this was a misdirection, for that, assuming the detention of the plaintiff by the Commissioner at the office of the Board of Control to have been wrongful, it was not, in view of s. 83 and other provisions of the Act of 1890, the direct cause of his subsequent detention, but that this was caused by new intervening acts of the managers of the institutions in which the plaintiff was subsequently detained and of other persons appointed to perform acts which should lead to the discharge of a sane person from confinement.

Held, further, that the form of the leave of absence order was warranted by s. 55, sub-s. 3 (*b*), of the Act of 1890, and that this order and the reception order together justified the manager in taking the plaintiff back and detaining him.

Held, also, that the manager was absolved from liability by s. 330 of the Act of 1890, having acted in good faith and with reasonable care in the honest belief that the plaintiff's mental condition required that he should be taken back to and detained in the licensed house.

New trial ordered of the claim against the Commissioner; and judgment entered for the manager of the licensed house.

APPLICATION for judgment in or a new trial of an action heard before Lush J. and a special jury.

A detailed statement of the facts will be found in the judgment of Scrutton L.J. The following statement is in the main taken from the judgment of Warrington L.J.

On November 10, 1912, the plaintiff was received and detained as a lunatic in a house licensed by justices for the reception of lunatics at Malling Place, West Malling, of which the defendant Dr. George Henry Adam was the manager, under a reception order made by R. G. E. Locke, Esq., a justice of the peace for the county of Kent, upon the petition of Arthur Harnett, the plaintiff's brother, accompanied by medical certificates of two doctors named Penfold and Fisher in all respects in conformity with s. 4 of the Lunacy Act, 1890. Dr. Penfold was the plaintiff's usual medical attendant. Appended to one of the certificates was a letter dated November 8, 1912, written by the plaintiff to the local post office at Newington where he lived. It is set out in the judgments of Bankes and Scrutton L.JJ. The reception order remained in force during the whole of the period to which this action relates.

On December 12, 1912, the plaintiff was permitted by the

defendant Dr. Adam with the consent of two of the visitors appointed under s. 177 of the Act of 1890 to be absent for a period of twenty-eight days on trial in accordance with s. 55 of the Act, under what is known as a probation order. The form of this order will be found in the judgment of Bankes L.J. The plaintiff believed that he was to be under the care of his brother, Arthur Harnett, during his absence and, as he objected to this, he wrote on December 11 to Dr. Adam and to the Commissioners in Lunacy demanding to be handed over to the care of the police and offering to "give guarantee if required." On December 12 he left Malling Place in company with his brother, but refused to travel in the same compartment with him on the train to London. During the journey he gave his brother the slip and arrived alone at his own house at Newington in Kent that evening.

On December 13 he saw several persons. Of these persons two who were medical men, Dr. Cooper and Dr. Walker, gave evidence that in their opinion he was of unsound mind. The other persons took the opposite view. He spent that night at a hotel in London, whither he had gone late in the evening without luggage of any kind.

On the morning of December 14 he cashed a cheque for 30*l.* at the office of some hop factors in the Borough whom he knew. He received the amount in gold and placed it loose in a small brief bag which he carried. At about 10.15 in the morning he called at the office of the Board of Control, constituted by the Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28, s. 22), at 66, Victoria Street, and asked to see one of the Commissioners. At eleven o'clock or thereabouts he saw the defendant Dr. Bond. About an hour afterwards a telephone message was sent to the defendant Dr. Adam from the Commissioners to the effect that the plaintiff was interviewing them and that he did not appear to be in a fit state to be at large. Dr. Adam on receipt of the message arranged that a motor car with two men should be sent at once to take the plaintiff back to Malling Place. Dr. Bond caused the plaintiff to be detained till the motor came. It

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arrived soon after 2 P.M. with two attendants, and they took the plaintiff back to Malling Place.

From December 14, 1912, to February 22, 1913, the plaintiff was detained at Malling Place; on February 22 he was removed to a public mental hospital maintained by the Croydon Borough Council at Warlingham. While there, on November 10, 1913, he was certified as still being of unsound mind. There he remained till August 24, 1917; on that day he was removed to the Holloway Sanatorium first to Virginia Water from August 24, 1917, to April 30, 1918, and then to their branch house at Canford Cliffs, Bournemouth, from April 30, 1918, to April 29, 1920; on April 29, 1920, he left Canford Cliffs and went as a single patient to the house of Dr. Little, known as The Orchards, at Aylsham, Norfolk. These various confinements were under the original reception order of November 10, 1912. On October 15, 1921, he escaped from Aylsham, and having remained away for fourteen days became under s. 55, sub-s. 8, and s. 85, of the Act free from liability to be retaken and further detained. By an order of the Court dated December 12, 1921, his property, of which his wife had in 1913 been appointed manager, was restored to him.

On May 31, 1922, the plaintiff brought an action for conspiracy, assault, and false imprisonment against Dr. Bond and Dr. Adam, alleging that the defendants had conspired to cause him to be unlawfully detained at the offices of the Board of Control when he was out on probation in December, 1912, and to be retaken to the house for the reception of lunatics at Malling Place, as a consequence whereof he was detained in the various mental hospitals and asylums above mentioned until he escaped on October 15, 1921. He also claimed against each defendant severally.

The defendants delivered separate defences. Both defendants denied the conspiracy. The defendant Dr. Bond denied that he detained the plaintiff at Victoria Street as alleged, and that the subsequent detentions complained of were the consequence of that detention; as an alternative defence he paid 10*l.* 10*s.* into Court with a denial of liability. The

defendant Adam pleaded that the terms of the probation order empowered him to take back the plaintiff into the licensed house at West Malling if his mental condition required it, which it did, and further that in all he did he acted in good faith and with reasonable care and was consequently relieved from liability by s. 330 of the Lunacy Act, 1890.

On the fifteenth day of the hearing the learned judge commenced his summing up and concluded it on the sixteenth. The questions which he left to the jury and the answers of the jury thereto were as follows :—

1. Did Dr. Bond cause the plaintiff to be detained at the office until the attendants came for him ?—Yes.

2. Did he cause him to be sent back for the purpose only of his being examined by Dr. Adam or for the purpose of his being detained at Malling Place ?—Being detained at Malling Place.

3. Did Dr. Bond cause the plaintiff to be taken back ?—Yes.

[This question, as originally put, continued: or did Dr. Bond agree with Dr. Adam, after consultation, that he should be taken back ? or was the taking back entirely the work of Dr. Adam ?]

4. Was the plaintiff of unsound mind on December 14, 1912 ?—No.

5. Was he fit to be at large ?—Yes.

6. Was he dangerous to himself or others ?—No.

7. Did Dr. Bond honestly believe that the plaintiff was of unsound mind ?—No.

8. Or that he was not fit to be at large ?—No.

9. Or that he was dangerous to himself or others ?—No.

10. Did he believe that the plaintiff had escaped from his brother's charge ? If so, was that his reason for having him sent back ?—Yes.

11. Did he take reasonable care to ascertain the true facts ?—No.

12. Did he honestly believe that Dr. Adam had retained a power of taking the plaintiff back during the twenty-eight days in the leave of absence order ?—Yes.

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13. Did Dr. Adam when he received the telephone message and sent the car, honestly believe that the plaintiff on December 14 was of unsound mind and unfit to be at large ?—Yes.

14. That it was in his interest that he should be taken back to Malling Place ?—Yes.

15. Did he take reasonable care in acting as he did ?—No.

16. Did he make it known to the plaintiff that he was liable to be retaken if his mental condition required it ?—No.

17. Was the detention of the plaintiff at the Commissioners' office the act of Dr. Bond or was it really the act of both the defendants ?—Dr. Bond.

When the jury had given these answers the learned judge proceeded to direct them that in assessing the damages it was within their province and power, if they thought fit, to take into account the plaintiff's detention from December 14, 1912, to October 15, 1921, if they thought that detention was the direct consequence of what the defendants did on the earlier date. The passage from the shorthand note of the direction to the jury will be found in the judgment of Bankes L.J.

After this direction the jury were asked to assess damages against the defendants. They answered 25,000*l.* They were then asked (*a*) to apportion the sum of 25,000*l.*, to which they answered, "Bond, 17,500*l.*; Adam, 7,500*l.*": (*b*) to assess the damages on the footing that the defendants were only responsible for the detention up to February 22, 1913, and apportion it, the special damage being 82*l.* To this they answered, "The total sum is 10,000*l.*; Bond, 7,500*l.*; Adam, 2,500*l.*": (*c*) to assess damages against Dr. Bond merely for detention at the offices, taking into consideration the whole purpose for which the plaintiff was detained; to which they answered 5,000*l.*: (*d*) to assess damages against the defendants jointly on the footing that they knew the plaintiff would be deprived of the remainder of his twenty-eight days' liberty, and to apportion that. To this they answered, "Total sum 9,800*l.*; Bond 7,400*l.*; Adam 2,400*l.*" After argument upon these findings the learned judge ordered

judgment to be entered for the plaintiff against Dr. Bond for 5,000*l.*, and against the defendants jointly for 20,000*l.*

The defendants appealed.

Sir Patrick Hastings A.-G., *Harold Morris K.C.*, *Bowstead* and *H. L. Murphy* for the appellant Bond. The learned judge misdirected the jury in telling them that the detention of the respondent for eight years and a-half might be imputed to this appellant as the consequence of his act in detaining the respondent for two hours at Victoria Street on December 14, 1912. When the respondent was taken back to Malling Place his rights were regulated by the enactments constituting and defining a reception order. By s. 35, sub-s. 1, of the Lunacy Act, 1890 (1), a reception order authorizes the taking of a lunatic and conveying him to the place mentioned in the order, and detaining him there. By s. 38, sub-s. 1, a reception order expires at the end of one year from its date, unless it is continued as provided by the Act. Therefore, if not continued, the reception order in this case would have expired on November 10, 1913. The continuation of a reception order depends upon s. 7 of the Lunacy Act, 1891; it is effected by a special report of the medical officer of the institution upon the mental and bodily condition of the patient together with a certificate under his hand certifying that the patient is still of unsound mind and a proper person to be detained under care and treatment. These documents are sent to the Commissioners, and thereupon the reception order remains in force for two years. This was done in the present case. Again, by s. 7 of the Act of 1891, the order would have lapsed on November 10, 1915, without a further report and certificate; and again on November 10, 1918. Each of these prolongations was the direct consequence of the act, not of the appellant Bond, but of the medical officers first at Warlingham and then at Canford Cliffs, independent agents over whom the appellant Bond had no control and for whose acts he was not responsible. Furthermore, by s. 83, it is the duty of the manager of every

(1) The relevant sections are set out in a note appended to this report.

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hospital and licensed house and of a person having the charge of a single patient, forthwith upon the recovery of a patient to send notice to the person on whose petition the reception order was made, stating that unless the patient is removed within seven days he will be discharged, and to discharge the patient if he is not removed within that time. By s. 39 the medical officer of every institution for lunatics must send to the Commissioners a report of the mental condition of a private patient one month after his reception and send a copy of the report to the visitors of licensed houses who are to make arrangements for a visit, with a view to reporting to the Commissioners any doubt concerning the propriety of the detention. If the managers of the hospital and houses in which the respondent was detained failed to discover that he had ceased to be of unsound mind, surely their failure cannot be laid to the charge of this appellant. But these are not the only safeguards provided by the Legislature against persons being detained without due cause in asylums and licensed houses. Sect. 75 of the Act of 1890 provides that visits may be made by Commissioners who may order the discharge of a patient if he appears to be detained without sufficient cause. By s. 78 visitors of a house licensed by justices may after two visits make a similar order after examining the medical officer of the house if he tenders himself for examination. For every asylum there is a visiting committee: s. 169; and for every house licensed by justices there are visitors: s. 177. Every asylum must be visited once a year by two Commissioners, one of whom shall be a medical practitioner: s. 187, sub-s. 1. Two members of the visiting committee must once in every two months inspect each asylum and see every patient therein: s. 188. Every licensed house in country districts must be visited twice a year by two Commissioners: s. 191, sub-s. 3. Visiting Commissioners and visitors must see every patient in the hospital or licensed house: s. 194, sub-s. 1. Assuming that the respondent was, as the jury found, in his right mind on December 14, 1912, and assuming that they inferred, for they have not expressly found, that he was sane throughout

the following eight years and a half, it cannot, in view of all the statutory safeguards, be maintained that his prolonged and inexcusable confinement was the direct result of two hours' detention by the appellant Bond at the offices of the Board of Control on December 14. The acts of managers, Commissioners and visitors in certifying his state of mind and assenting to his detention intervened between any wrongful act of the appellant Bond and its so-called consequences. But a defendant is only liable for the direct consequence of his wrongful act; the intervening act of an independent third person over whom the defendant has no control breaks the chain of causation, so that the defendant is not liable for what is really the direct consequence of the intervening act: *Ward* v. *Weeks* (1); *Weld-Blundell* v. *Stephens*. (2) The case closely resembles that of a defendant who gives a man in custody on a charge on which a magistrate subsequently remands but ultimately acquits him. The defendant may be liable for false imprisonment up to the time when the act of the judicial officer intervenes; but at that point he ceases to be liable for false imprisonment and is only liable, if at all, for malicious prosecution: *Morgan* v. *Hughes*, per Ashhurst J. (3); *Lock* v. *Ashton* (4); *Austin* v. *Dowling*. (5)

If this appellant is not liable for anything that happened after December 14, 1912, the whole case upon a joint tort breaks down. The jury have found that the detention at Victoria Street was the act of Dr. Bond alone. He may be liable for that act, but if so the damages awarded by the jury 5000*l.* are exorbitant; that verdict cannot stand, and there should be a new trial on this point. With regard to the answers of the jury to the seventh, eighth, ninth, tenth and eleventh questions—that Dr. Bond did not honestly believe that the respondent was of unsound mind and unfit to be at large and dangerous to himself—it is enough to say that there was no evidence to support them. The behaviour of the respondent at the office in Victoria Street, as described in

(1) (1830) 7 Bing. 211, 215.
(2) [1920] A. C. 956, 976, 987.
(3) (1788) 2 T. R. 225, 231.
(4) (1848) 12 Q. B. 871.
(5) (1870) L. R. 5 C. P. 534.

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the evidence, coupled with the copy of the letter of November 8, 1912, which was on the Commissioners' file and must have been seen by Dr. Bond, were enough to induce an honest belief that the respondent was of unsound mind and dangerous to himself or others, and no reason can be assigned why the belief should be other than honest.

Sir Douglas Hogg K.C., *Neilson K.C.* and *Carthew* for the appellant Adam. There was no evidence to support the answer of the jury to the fifteenth question—that this appellant did not take reasonable care in acting as he did. The only ground suggested for that answer is that he did not himself go in the motor from Malling Place to Victoria Street to bring the respondent back. It might have been a kindly and a courteous act to go himself, but to refrain from going was no evidence of negligence or want of reasonable care.

Upon the answers to questions 13 and 14—that he honestly believed that the respondent on December 14 was of unsound mind and unfit to be at large, and that it was in his interest that he should be taken back to Malling Place—this appellant is entitled to judgment.

First, the terms of the probation order justified him in retaking the respondent. It expressly states that the leave is revocable at any time during the period of leave, and provides that the medical officer shall at any time before the expiration of that period have power to take back the patient if his mental condition requires it. Who is to decide whether the patient's mental condition requires that he should be taken back? The medical officer who must decide in the emergency, or the jury who may try the question at their leisure twelve years after the emergency is past? Surely the medical officer is the one to decide this question. But assuming it was a question for the jury and assuming that, as they have found, the respondent's mental condition did not require that he should be taken back, there is still their other finding, that this appellant honestly believed it did. By s. 330 of the Act of 1890 a person who does anything in pursuance of the Act is relieved from liability to proceedings if he has acted in good faith and with reasonable care. If it were necessary to

establish that the burden lies on the respondent to show want of reasonable care, sub-s. 2 affords firm ground for holding that it does ; it presumes that a person acting in pursuance of the Act has exercised reasonable care, otherwise he could hardly have a case summarily dismissed for want of evidence that there was no reasonable care or good faith. *Williams* v. *Beaumont* (1) and *Shackleton* v. *Swift* (2) support this contention. But it is not necessary to establish that the burden lies on the respondent, for if it lies on the appellant he has discharged it. If this is so, there was no conspiracy and no joint tort and the only wrongful act in the whole case was the detention of the respondent by Dr. Bond at the offices in Victoria Street. But if in the view of the Court Dr. Adam was guilty of any unlawful act, he cannot be held responsible for anything done after February 22, 1913, when the respondent left Malling Place. Any wrong done after that was the wrongful act or omission of the manager of the particular institution in which the respondent was for the time being detained or of the visitors or other officers who should have seen that he was released immediately upon his recovery. Upon this point the appellant Adam adopts the argument of counsel on behalf of the appellant Bond.

Sir John Simon K.C., *J. B. Matthews K.C.*, *Sydney Davey* and *Cope Morgan* for the respondent. Whatever may have been the respondent's mental condition, or its cause, on November 10, he had recovered his health on December 12, and was of sound mind on December 14, 1912, according to the verdict of the jury supported by ample evidence. For eight years and ten months he has been detained in one institution for lunatics after another. It is not seriously denied that the detention at Victoria Street on December 14, 1912, was illegal, but it is said that it was not the joint act of the two appellants and the answer of the jury to question 3 is relied on as establishing that it was the sole act of Dr. Bond. But their answer to question 2 shows that Dr. Bond detained the respondent for the purpose of his being detained at Malling Place; and Dr. Adam knowing

(1) (1894) 10 Times L. R. 543. (2) [1913] 2 K. B. 304.

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that he was being detained at Victoria Street sent the motor with two attendants to take him back to Malling Place. Here are all the elements of a joint tort committed by the two appellants. "All persons in trespass who aid or counsel, direct, or join, are joint trespassers": *Petrie* v. *Lamont* (1), per Tindal C.J.; Clerk and Lindsell on Torts, 7th ed. (1921), p. 59; *The Koursk.* (2) Moreover the act of Dr. Adam in taking him back to and detaining him at Malling Place was an unauthorized and an illegal act. The terms of the probation order will not avail to justify that act unless they are themselves warranted by the Lunacy Act, 1890. Sect. 55 of that Act says nothing about the leave of absence being revocable at any time; it gives no power to take a patient back into confinement whenever the manager of the house may think that his mental condition requires it. It merely enables the manager to permit the patient "to be absent upon trial for such period as may be thought fit." The period in this case was twenty-eight days. The only conditions upon which the Act allows a patient to be retaken are those imposed by sub-s. 8—namely, if he does not return at the expiration of his leave of absence, and no medical certificate is produced negativing the necessity of his further detention. As neither of these conditions was fulfilled the respondent was entitled to his liberty for twenty-six days after he was taken back. And even if the form of the probation order is warranted by the Act, it only enables a patient to be taken back if his mental condition requires it in fact; and even then he can only be "taken" in the sense of "received" back when brought to the licensed house. Nothing would justify his being forcibly taken back except a new certification under ss. 15 or 16 of the Act. Dr. Bond aided, counselled, and joined in this wrongful act of Dr. Adam and was a joint tortfeasor with him.

Then it cannot be said that the wrongful act of Dr. Bond ceased when the respondent was handed over to Dr. Adam. It lasted until there was a real novus actus interveniens, for if his act was a direct cause of the further detention it

(1) (1841) Car. & M. 93, 96. (2) [1924] P. 140.

does not lose that character by mere association with another cause: *Clark* v. *Chambers* (1); *Engelhart* v. *Farrant & Co.* (2); *McDowall* v. *Great Western Ry. Co.* (3) The views of those who subsequently detained the respondent were coloured by the act of Dr. Bond on December 14, 1912; it may even be that it injuriously affected the respondent's health and was the cause of their continuing to detain him when but for that act he might never have been detained at all. On the other hand, assuming that it had not this injurious effect, their failure to diagnose correctly his state of mind was not a novus actus which would break the chain of causation; for, first, an act of a third party induced by the original act of the wrongdoer cannot be relied on by him as a novus actus; and secondly, because one who commits a wrongful act cannot assume that all the rest of mankind are impeccable and infallible. He must take human nature as it is with its infirmities: *Lynch* v. *Knight* (4), per Lord Wensleydale, and for the direct consequences, however unexpected, of his wrongful act he is responsible: *In re Polemis & Furness, Withy & Co.* (5)

Secondly, Dr. Adam cannot rely on s. 330 of the Act. What he did was not done "in pursuance of this Act," because he could not have had an honest belief in a state of facts which if true would justify him under the Act: *Hermann* v. *Seneschal* (6); *Chamberlain* v. *King* (7); *Griffith* v. *Taylor*. (8) He must have known that a Commissioner had no power to detain a person even if he bona fide believed he was unfit to be at large.

Harold Morris K.C. in reply for Dr. Bond.

Sir Douglas Hogg K.C. in reply for Dr. Adam. The whole of the probation order is intra vires, including the words empowering the medical officer—i.e., Dr. Adam—to "take back" the patient. It is incredible that the Legislature should intend that a patient, whose mental condition

(1) (1878) 3 Q. B. D. 327.
(2) [1897] 1 Q. B. 240.
(3) [1903] 2 K. B. 331.
(4) (1861) 9 H. L. C. 577, 600.
(5) [1921] 3 K. B. 560.
(6) (1862) 13 C. B. (N. S.) 392.
(7) (1871) L. R. 6 C. P. 474.
(8) (1876) 2 C. P. D. 194.

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requires that he should be taken back, should have a right to be at large until certified de novo as a person of unsound mind, merely because he is out on leave of absence, on trial. Leave is in its nature revocable; the trial may prove a failure. The terms of the order merely express the implicit intention of the statute.

Next, the words "take back" do not occur in Part I. of the Act, which deals with the Reception of Lunatics, but in Part II., headed Care and Treatment, and containing ss. 85, 87 and 88, which speak of "retaking" the lunatic. "Taking" and "receiving" are contrasted in s. 35, which enables the person authorized to "take" the lunatic and convey him to the place named and provides for his "reception" and detention therein. It is plain therefore that "take" means more than "receive." The word implies the use of force if necessary.

Cur. adv. vult.

May 16. The following written judgments were delivered:—

BANKES L.J. The verdict and judgment in this case have given rise to a widespread feeling of anxiety and apprehension. A jury by their verdict have found that a sane man has been detained in asylums and institutions for the insane for over eight years in spite of all his endeavours to obtain his release. A learned judge by his judgment has decided that it is possible for a person, who in the opinion of a jury acted without sufficient care in taking action which resulted in some other person being detained under the lunacy laws as a person of unsound mind, to be held responsible in damages because the persons whose duty it was to secure the patient's discharge, if he was in fact sane, failed to realize that he was sane, and continued to detain him, and this even though the person held to be responsible acted in good faith and in the honest discharge of what he conceived to be his duty. Against this verdict and judgment both defendants appeal. Their grounds of appeal include that the verdict was against the weight of the evidence, that

the damages were excessive, and misdirection by the learned judge both on the fact and on the law.

For the purposes of this appeal the material facts can be shortly stated. In the month of October, 1912, the plaintiff was seriously ill, suffering from delirium, produced as he believed by the injection of excessive quantities of some substance, possibly tuberculin, by an unqualified person. According to his evidence at the trial, though still weak as the result of his illness, he was perfectly sane by October 31. This view was not shared by his relatives, and after examination by two medical men on November 10, 1912, an order was made by a justice appointed under the Lunacy Act, 1890, for the reception of the plaintiff as a person of unsound mind in the licensed house kept by the defendant Dr. Adam at Malling and known as Malling Place. Attached to the certificate of one of the medical men was a copy of a letter sent by the plaintiff on November 8 to the post office officials at the local post office. It was in these terms: "Dear Post Official, Jesus has touched my eyes. If I have done wrong I am willing to make things right. I love you. If you love Jesus and love me you will come and see me and make me happy. Yours sincerely, W. S. Harnett. A sinful man." The plaintiff explained that he wrote the letter because he regretted having made complaint about some non-delivery of letters. He also said that the copy was inaccurate, as the original was addressed to the officials in the plural. Attached as it was to one of the certificates this copy letter was presumably included among the documents forming the file relating to the plaintiff's case, and was therefore no doubt constantly referred to whenever any question was raised concerning the plaintiff's condition of mind. Whatever anyone else may have thought of the letter, the plaintiff himself did not regard it as any indication that the writer was not in his right mind when he wrote it. He was asked at the trial what he thought the recipients of the letter would think on that point, and his answer was: "They seemed very pleased with it when I saw them on Sunday. They shook hands with me. They are deeply religious people.

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They were such deeply religious people that I did not mind writing like that. The father, the mother and the daughter were religious people, they were the principal people there. When I went to see them the old man said: 'Lord bless you and keep you to the end.' They were very pleased with the letter. It was written on November 8."

There is and can be no complaint against the defendant Dr. Adam of having received the plaintiff into his house under the reception order. After he had been there about a month his condition had, in Dr. Adam's opinion, so improved that on December 12 a leave of absence order for twenty-eight days was sanctioned by the proper authority on Dr. Adam's advice. The order was in the following form: "We, the undersigned, being two of the visiting justices of private asylums for Kent, hereby sanction leave of absence from Malling Place of"—then the plaintiff's name was inserted—"on probation for the period of"—then twenty-eight days was inserted—"but this sanction is revocable by us at any time during that period. Provided that the medical officer shall at any time before the expiration of the said period, have power to take back the said patient into the licensed house, if his mental condition requires it. Dated this"—then there is a blank for the date to be filled in. Then signed by "two of the Visiting Justices for Kent." Unfortunately some misunderstanding appears to have occurred and the plaintiff was under the impression that he was being placed under his brother's care. He strongly objected to this, and as a result he wrote two letters on December 11, to which I must refer. The first was written to Dr. Adam about 11 A.M. It was in these terms: "Dear Dr. Adam, When I am set free I demand to be handed over to the police. I am prepared to give guarantees if required." The other was written about 6.30 P.M. to the Commissioners in Lunacy. It was in these terms: "Gentlemen, I am still under control. Dr. Adam informs me that my younger brother is coming to-morrow afternoon and that I am to go home under his care. He, I believe, petitioned to have me put here. I suppose he must come here to-morrow. I object to being

sent home under his care. I have demanded to be handed over to the care of the police when I am set free. I can give guarantees if required. If my demand is a legal one will you kindly wire, or telephone to Dr. Adam instructing him to accede to my wishes?" I merely read these letters as leading up to and explaining the plaintiff's visit to the offices of the Lunacy Commissioners on the day but one after he left Malling Place. The plaintiff's explanation of why he went there was that he wished to ask the Commissioners to send a man home to live with him in his house for the twenty-eight days during which, according to the plaintiff's statement, his brother had told him that he was to be under his care, in order that the man might see that he had fair play and was not, as he expressed it, "thrown away" a second time when he was sane. The account of Dr. Bond, one of the Commissioners in Lunacy, and of the secretary of the Commission, both of whom interviewed the plaintiff when he called, was that he was in such a condition as to be manifestly unfit to take care of himself, or to be allowed out any longer on probation, and that they accordingly communicated with Dr. Adam by telephone informing him of that fact. Dr. Adam thereupon sent a motor with two attendants to fetch the plaintiff, who was given to understand that he must remain at the office until the motor arrived. He did so remain for some hours. On the arrival of the motor the plaintiff was taken back to Malling Place, where he remained until February 22, 1913.

It was this detention at the Commissioners' office and the subsequent confinement at Malling Place which constituted the plaintiff's cause of action. His contention was that both defendants were responsible either jointly or severally and that their action was an imprisonment and entirely unauthorized and illegal. For the purpose of establishing his cause of action the question whether the plaintiff was or was not of unsound mind was wholly immaterial except as regards damages, because his contention was that even if he was of unsound mind neither defendant had the right to do what he did.

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It is necessary at this point to refer to the course of the proceedings at the trial, as otherwise it is difficult to realize how fifteen days were occupied before the evidence was completed. The plaintiff's counsel was naturally anxious to excite as much sympathy for his client as possible, and he was desirous therefore of going into the whole story of the plaintiff's detention and into his state of mind from the date of the reception order in November, 1912, right down to October, 1921. He claimed the right to give evidence upon the state of the plaintiff's mind over the whole period on the ground that the evidence had some bearing upon the state of his mind on December 14, 1912. The Attorney-General, who appeared for Dr. Bond, did not contest the admissibility of the evidence on this point, but he protested against the evidence being used on any question of damages for any detention subsequent to that date. At a later stage the Attorney-General intimated that, although it was no part of the defendants' case to contend that the plaintiff was still of unsound mind after he left Malling Place, yet if the plaintiff's counsel desired it in order to secure a fair trial for his client, he would call witnesses from the asylums and institutions in which the plaintiff had been detained, while still maintaining his contention in reference to any claim for damages in respect of this period. The plaintiff's counsel not unnaturally welcomed this opportunity and took full advantage of it, and the trial ultimately partook more of the nature of an inquiry into the administration of the lunacy law as applied to the plaintiff's case, than of a trial of the issues in the action. The prolonged inquiry, the long drawn out story of the plaintiff's captivity, the skilful use by the plaintiff's counsel of the opportunities given him of appealing to the sympathies of the jury, all combined to produce an atmosphere in which the sufferings of the plaintiff monopolized attention. The view of the jury was ascertained by a series of questions. On the question whether the plaintiff was of sound mind on December 14, 1912, and fit to be at large, and not dangerous to himself, the jury found in the plaintiff's favour. It is a curious fact that the jury were not asked any

question touching the plaintiff's mental condition at any date after December 14, and it is a little hard to see how the damages awarded could possibly be justified in the absence of a finding in the plaintiff's favour covering the whole period from December 14, 1912, to October, 1921. I assume, but without coming to any decision on the point, that the jury must have considered that the plaintiff was not of unsound mind at any time during that period. Both defendants in their notices of appeal ask to have the findings of the jury upon the plaintiff's mental condition set aside on the ground that the verdicts were against the weight of the evidence. No argument was addressed to the Court on the point, and I therefore express no opinion upon it. The appeal must be decided upon the footing that the findings of the jury on this question were justified by the evidence.

Upon the assumption that both defendants were jointly responsible for the detention of the plaintiff at the Lunacy Commissioners' office on December 14, and for his subsequent removal to and detention at Malling Place, the jury awarded the plaintiff 25,000*l.* damages. A question which affects both defendants is whether that verdict can possibly stand. The sum must have been arrived at upon the assumption that the detention of the plaintiff from December 14, 1912, right down to his escape in October, 1921, was a direct consequence of the defendants' wrongful acts committed on December 14. Upon this part of the case the defendants complain of misdirection by the learned judge both upon the facts and upon the law. I will take the learned judge's view as expressed in his own words in his direction to the jury, and in his subsequent judgment on the application to enter judgment. In his direction to the jury on the question of damages the learned judge said this: "Members of the jury, now it remains to me to ask you what damages you ought to award the plaintiff. I am going to ask you to deal with both the defendants and to treat it as a joint claim against them both, so that whatever verdict you give will be a verdict against them both jointly. Do you follow what I mean? The question has been raised by the Attorney-General and

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a very serious question it is—namely, whether in law it is possible for you in awarding damages to compensate the plaintiff for his detention during the whole of the eight and a-half years? The Attorney-General contends that I ought to direct you that in law you are not able to take the whole period into your consideration. He contends that I ought to direct you that you can only give to Mr. Harnett damages based upon the footing that he was imprisoned unlawfully, but that you ought to shut out of your mind the fact, in considering the amount of damages you give him, that he did suffer this wrong detention. I do not agree with the view of the Attorney-General. In my opinion, it is within your province, if you think fit, not otherwise—I do not tell you you must—and within your power, to compensate Mr. Harnett upon the footing that the direct consequence of what the defendants did was that he should be detained during the whole period until he escaped from the home at Aylsham. The Attorney-General has said, you know, that there has been what is called a break in the continuity of the chain. He says, if that is so, you cannot treat the whole period of his detention as following from, or flowing from, the wrongful acts of the defendants. I have said I do not agree with him, and I will tell you why, and I will explain to you why." The learned judge then called the attention of the jury to the facts in the case of *Isitt* v. *Railway Passengers' Assurance Co.* (1) He then proceeds: "If you think that the detention for these nine years was the direct consequence of his illegal imprisonment, that there was no intervention of third persons at all, but that it follows straight away from the first wrongful act, you can take the whole of that nine years into your consideration. You can take all of it into your consideration. It is so obvious, you know, if Dr. Bond, as you have said he did, caused this man to be detained in an asylum, Dr. Bond would know, as anybody else would know, that he might in the ordinary course have gone on being visited by one visitor and one Commissioner after another, and he might never get out. It was not that anybody intervened and did an

(1) (1889) 22 Q. B. D. 504.

act like knocking him down. It happened unfortunately that they had omitted to discover that he was of sound mind. That is what happened. That is quite a different thing from doing something to him and causing a fresh injury. Therefore, I tell you that you may take, if you think it is right to do it, the whole period into your consideration." As the jury were on the point of retiring the foreman asked the learned judge this question: "There is just the question of the period of time. Is it exactly eight and a-half years that we have to take into account?" (Lush J.): "He was sent back on December 14, 1912, and he escaped from Aylsham on October 15, 1921." (The Foreman): "Thank you." (Lush J.): "That will give you the exact period." (The Foreman): "Yes."

After the jury had given their verdict and the learned judge had heard arguments on the question how judgment should be entered, he dealt with the matter of remoteness of damage. I must read some of the material parts of the judgment. He says: "One of the obvious risks that a person is exposed to if he is a patient in a lunatic asylum is that he may still be thought insane when in fact he is sane. That risk, the risk of that consequence following, is directly caused by his being placed in an asylum and the peril was especially great in the plaintiff's case for the reasons that I have mentioned. Each fresh medical superindendent when he received the plaintiff into his home would know the reports by the doctors at the previous places at which he had been detained and would know their views and observations with regard to him and would necessarily take into account, in considering his mental condition, what his previous history had been. I cannot regard the decisions arrived at by the different doctors, Commissioners and visitors at the various homes and the decisions arrived at by the medical superintendent in the same home from time to time as a fresh intervention which would break the chain of causation. It was nothing of the kind. Moreover what each doctor did was not to do some act which would injure the plaintiff but to omit to discover that he had recovered. It was the failure

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to do something, not the doing of some independent act, that caused the plaintiff's further detention. Each doctor, each Commissioner, each visitor was not an actor at all for the purpose under discussion. This case differs entirely from cases where there is a novus actus interveniens. If the plaintiff had been injured, for example, when being taken out for exercise by an attendant, by the wrongful act of some independent person, the chain of causation would be broken and the original wrongdoer could not be made responsible for the consequences of that injury. But that kind of case bears no resemblance to such a case as this. I think that the true view to take of the matter here is that the detention during the whole nine years was the direct consequence, following in an unbroken chain, of the wrongful sending of the plaintiff back by Dr. Bond, and the wrongful assistance given by Dr. Adam in accomplishing that purpose, and that there was no intervention of an independent person which would break the chain of cause and effect. It was wholly immaterial that no doctor or other official discovered, as he should have done, that the plaintiff was not insane. I ought, I think, specially to refer to the certification on November 10, 1913. In my view, this does not constitute an 'intervention.' What is done is mere machinery for the purpose of avoiding the necessity of having a new reception order drawn up. The report of the medical superintendent is in no way different from his ordinary reports except that it brings about this consequence."

Whether the learned judge's direction to the jury and whether his view of the law as applied to the facts of this case are correct, is a vital point. With all respect to the learned judge I am unable to take the same view as he did, either of the facts, or of the law. I cannot draw the distinction which the learned judge draws between acts of commission and acts of omission. I cannot look upon the serious act of certification as mere machinery. I find the chain of causation broken at innumerable points, and I cannot hold that it was permissible for the jury to take the whole period of the plaintiff's captivity into their consideration in assessing

damages. If this view is right it follows that the verdict and judgment against the defendants as joint tortfeasors must be set aside. It is not material in my view of the case to discuss at any length the attempts which were made to assess the appropriate amount of damages assuming that the defendants were liable only for part of the period of the plaintiff's detention, or for separate torts instead of a joint tort, because all the attempts were based upon a process of splitting up, or cutting down a figure which had been arrived at upon what I consider to be an entirely inadmissible estimate of the defendants' responsibility.

In order to explain why I differ from the learned judge on the question of remoteness of damage, it is necessary to refer to the Lunacy Acts of 1890 and 1891, and to the scheme of the legislation contained in those statutes. In dealing with the Lunatic Asylums Act, 1853, that wise and learned judge the late Lord Lindley in *Reg.* v. *Whitfield* (1) speaks of that statute as one which had given justices of the peace and medical men large powers, and that the statute was based upon the theory that they could be trusted. That statement is, in my opinion, equally true of the Lunacy Acts of 1890 and 1891. In an examination of the provisions of those statutes, as applicable to the present case, one can start with the reception order dated November 10, 1912. That order authorized the defendant, Dr. Adam, to receive and detain the plaintiff in his registered house at Malling. The order does not in terms refer to any detention, but the whole scheme of the statute, and in particular the provisions of s. 35, indicate that a reception order, if it satisfies the requirements of the statute, is of itself a sufficient justification for the detention of the person named in it, and if the person escapes, he may, under s. 85 of the Act of 1890, without any fresh order and certificate or certificates, be retaken at any time within fourteen days after his escape by the manager of the institution for lunatics in which he was detained, or by any one authorized in writing by the manager. By s. 7 of the Act of 1891, a reception order remains in force

(1) (1885) 15 Q. B. D. 122, 150.

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in the first instance for a year, and thereafter for two years, and thereafter for three years, and after that for five years, provided that not more than one month, nor less than seven days before the expiration of the period at the end of which the order would expire, a special report of the medical officer of the institution upon the mental and bodily condition of the patient, with a certificate under his hand certifying that the patient is still of unsound mind, and a proper person to be detained under care and treatment, is sent to the Commissioners. In framing any provisions for dealing with persons of unsound mind, or with persons alleged to be of unsound mind, the Legislature is faced with a difficult and a delicate task. To borrow Lord Denman's language in *Shuttleworth's Case* (1) the double protection has to be afforded against improper confinement on the one hand, and against danger from a lunatic being unrestrained on the other. Some of the safeguards provided by the present legislation consist of the provisions contained in Parts VI. and VII. of the Act of 1890 for periodical visits by specially appointed persons whether Commissioners, visitors or members of visiting committees, and in the powers given to such persons under ss. 75, 77, and 78 of the statute to make orders for the discharge of patients, and in the provisions contained in s. 83 for the steps which the manager of a hospital or licensed house has to take for the release of a patient who has recovered. These and many other provisions could be referred to as indications of the truth of Lord Lindley's statement that the whole scheme of the Legislature is based upon the trust which it has placed in the medical men and in the specially appointed officials whose duty it is to carry out the provisions of the law. I approach the consideration of the Lunacy Acts from an entirely different point of view from that taken by the learned judge. He considers that a deliberate decision by a responsible person directly affecting the liberty of the subject may, for the purpose of considering whether it constitutes a novus actus interveniens, be treated as mere machinery which can be

(1) (1846) 9 Q. B. 651, 658.

ignored. I cannot so regard any certificate given under s. 38 of the Act of 1890 and s. 7 of the Act of 1891. I go further, as I consider that the law casts upon every medical man in whose care a patient is placed under the Lunacy Acts, a daily and hourly duty of being satisfied, and of taking the necessary steps to satisfy himself, that the patient's condition is such as not only to justify, but to require confinement. I look upon every decision deliberately come to in the exercise of that duty, whether by a medical man, by a Commissioner, by a visitor, or by a member of a visiting committee, as of itself amounting to a novus actus interveniens. In the present case it is not suggested that the persons whose duty it was to form opinions of the plaintiff's mental condition did not form them. Such of the case books as were produced contain numbers of decisions deliberately formed and duly recorded. The complaint is not that they did not form the opinions, but that the opinions were wrong. For the present purpose this is not a material consideration. I am unable also to accept the view of the learned judge that because the persons whose duty it was to come to decisions upon the plaintiff's mental condition omitted to diagnose his case correctly, their actions can be treated as acts of omission and therefore ignored. Here, again, so much depends upon the point of view from which the Act is regarded. A medical man who diagnoses a case of measles as a case of scarlet fever may be said to have omitted to make a correct diagnosis; he may equally well be said to have made an incorrect diagnosis. In my opinion, the decisions come to over this long period of years by all the persons whose duty it was to come to a decision upon the plaintiff's mental condition, even assuming they were incorrect and in one sense omissions, are yet quite clearly also acts of commission, each of which operates as a novus actus interveniens, breaking the chain of causation between the acts of the defendants which are complained of, and the subsequent detention of the plaintiff. I need not refer in detail to the occasions on which the chain must, in my opinion, have been broken. They must have been of almost daily occurrence. I may perhaps note some

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of the more important. There were three occasions when certificates were given under s. 38; there were special visits of Sir James Crichton-Browne on more than one occasion; visits were paid by a Commissioner, or a Lord Chancellor's visitor, in June and July, 1913; August, 1916; May, August, and October, 1917; February and April, 1918; March, April, and October, 1920; and February and June, 1921; there may have been others which I have not noticed.

It is not necessary to go further back than the recent case of *Weld-Blundell* v. *Stephens* (1) and to the speeches of Lords Dunedin and Sumner in that case for an authoritative statement of the law applicable to this part of this case. To adopt Lord Dunedin's language, the question for decision is whether the damage complained of by the plaintiff was the natural consequence of the alleged wrongful acts of the defendants, or whether it was the result of some novus actus interveniens. Lord Sumner prefers the description "direct" to "natural" as applied to consequence. Both learned Lords apply a test for ascertaining whether the damage complained of in that case was either natural or direct, which test, though differing in form, is the same in substance. Lord Dunedin says (2): "It was the repetition of the words by Hurst to Lowe and Comins, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." Lord Sumner says (3): "In general (apart from special contracts and relations and the maxim Respondeat superior), even though A. is in fault, he is not responsible for injury to C. which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause." Applying these tests to the present case, my opinion is that as soon as the plaintiff passed out of the care of Dr. Adam into the care of others whose statutory duty it was to form, and who did form, independent opinions upon the plaintiff's state of

(1) [1920] A. C. 956. (2) [1920] A. C. 976.
(3) [1920] A. C. 986.

mind, then if the plaintiff continued to be detained as a result of those opinions, the defendants cannot be held responsible for that detention. That the continued detention of the plaintiff was the result of those opinions cannot, I think, be disputed. Whatever the view of the Court may be upon the other points in the appeal, the view which I have just expressed would render a new trial in the case of both defendants necessary.

The case of Dr. Adam, however, demands separate inquiry. The question in his case is whether he has been guilty of any actionable wrong, and that question depends upon a consideration of the plaintiff's position under the Lunacy Acts whilst on leave of absence, and of Dr. Adam's rights arising out of the reception order of compelling the plaintiff to return, and upon the question whether Dr. Adam is entitled to the protection of s. 330 of the Act of 1890. The two questions are quite distinct and must be dealt with separately. The argument for the plaintiff appears to treat the leave of absence order as a grant of complete liberty for the full period of twenty-eight days. In my opinion it is nothing of the kind. It is, in my opinion, nothing more than an intimation by the medical officer to the patient, sanctioned by two of the visitors, and consented to by the person on whose petition the reception order was made, that he, the medical officer, will not, during the period named in the order, put in force the powers conferred upon him by the reception order, unless in the exercise of his discretion he considers it necessary to do so. What are those powers? They include the power of physical restraint so long as the patient is in a place where he can be controlled by the medical officer, or by those he appoints to represent him. If the patient is absent on leave of absence and is required by the medical officer to return and he refuses, he becomes, in my opinion, an escaped person and liable to be retaken under s. 85 of the Act just as much as if he had run away from an attendant while out on a walk with him. The case of the patient who outstays his leave of absence, and does not send a medical certificate, is specially dealt with in

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s. 55, sub-s. 8. He can be retaken as an escaped person, even though he had not been ordered or requested to return. If therefore Dr. Adam had telephoned to the plaintiff instead of to Dr. Bond and had ordered him to return and the plaintiff had refused to do so, Dr. Adam would in my opinion have been quite justified in treating the plaintiff as an escaped person, and in sending for him as he did, provided the attendants were properly authorized in writing. It was not, however, necessary to treat the case as one of an escape. The form of the absence order merely suspends the medical officer's powers under the reception order until such time as he considers it necessary to "take back" the patient. From this point of view the patient is not an escaped person who requires to be retaken. The taking back is merely the putting into operation of the suspended powers under the reception order. I cannot accept a construction of the order which substitutes "receive" back for "take" back, as no authority was needed to receive the patient so long as the reception order was in force. Nor can I adopt the construction of the statute contended for by the plaintiff's counsel, that the proper procedure under the circumstances, if Dr. Bond considered the plaintiff unfit to be at large, was to treat him as a lunatic wandering at large under s. 15 of the Act of 1890. Apart from the fact that this section comes in the part of the Act dealing with cases where there is no reception order in existence, and therefore has no application to this case, I should hesitate long before accepting a construction of the statute which required the apprehension by a constable as a necessary step to terminate a patient's leave of absence. For these reasons I think that Dr. Adam was under the circumstances entitled to terminate the plaintiff's leave of absence, and to do it in the way in which it was done.

The second contention made on Dr. Adam's behalf was that in any event he is entitled to the protection of s. 330 on the ground that in what he did he acted in good faith and with reasonable care. The jury found in Dr. Adam's favour that when he received the telephone message on December 14 and sent the car, he honestly believed that

the plaintiff was of unsound mind and unfit to be at large, and that it was in his interest that he should be taken back to Malling Place, but they found that Dr. Adam did not take reasonable care in acting as he did. A considerable amount of argument was directed to the question of the onus of proof and whether it rested upon the defendant to prove that reasonable care was used, or on the plaintiff to prove the absence of it. In the present case it does not seem to me necessary to decide that point, because if the onus was on the defendant, he in my opinion discharged it; if it was on the plaintiff, I consider that there was no evidence to support the finding of the jury. The only suggestion of want of care is that Dr. Adam did not go himself in the motor instead of sending two attendants. If the question had to be looked at from the point of view of the plaintiff's position, it seems curious that the suggestion should have been made. The plaintiff's case was and is that he was a sane man, and that Dr. Adam was a person who was incapable of forming an accurate judgment upon his mental condition; why then should it be considered necessary that Dr. Adam should himself have gone to take back the plaintiff? The question however must be considered from the point of view of Dr. Adam's position. What was that? The plaintiff was no stranger to him; the message he received was not one indicating that any doubt existed which needed clearing up; the message was received from a source which was certainly authoritative; Dr. Adam believed it. I cannot see that prudence or consideration for the patient required anything except what Dr. Adam did—namely, to take the necessary steps to secure the plaintiff's return as speedily as possible. A great deal was made of Dr. Adam's statement that he would have gone himself but for the fact that it was the day on which his partner would naturally be off duty in the afternoon. The test of what amounts to reasonable care in a particular case is not necessarily what a person would do under ordinary circumstances; the circumstances in the present case were exceptional. In the particular circumstances of this case I cannot see any evidence of want of

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care on Dr. Adam's part, and I think that the importance attached to the fact that he did not go himself to fetch the plaintiff is only one of many instances in which during the trial comparatively unimportant incidents received more consideration than they really deserved. In my opinion judgment should have been entered for Dr. Adam, and the appeal in his case will therefore be allowed, and the judgment for the plaintiff will be set aside and entered for this defendant with the costs of the action and of the appeal.

The case of the defendant Dr. Bond stands upon an entirely different footing. The Attorney-General appearing for him admits that, however well intentioned he may have been, he had no legal justification for his action. The verdict and judgment entered against Dr. Bond cannot be allowed to stand, as, apart from any other considerations, the damages awarded have been assessed on a wrong basis, as I have already pointed out. As a new trial must be had on this ground, I say nothing on the other points of which complaint is made. The damages upon the new trial must be confined to damages in respect of an imprisonment up to, but not beyond, the time when Dr. Adam had the opportunity, and exercised it, of forming an independent judgment upon the plaintiff's mental condition and whether it was necessary to continue to detain him under the reception order. In the case of Dr. Bond the order of the Court is that the verdict and judgment are set aside and a new trial ordered, Dr. Bond to have the costs of the appeal. As the costs of the first trial were greatly increased by the form and extent of the plaintiff's claim against Dr. Bond, we think that there should be a special order as to the costs of the first trial. Those costs will abide the result of the new trial, but in the event of the plaintiff succeeding upon the new trial, the costs of the first trial must be confined to such costs as the taxing Master considers reasonable had the first trial been confined to an action against Dr. Bond alone and for damages in respect of a period which terminated on Dr. Adam deciding after the plaintiff's return to Malling Place that he should

continue to be detained under the reception order. The plaintiff must pay back the moneys which, under the order of the judge, were paid to him.

WARRINGTON L.J. [after stating the facts continued]: Dr. Bond admits that he wrongly detained the plaintiff at his office on December 14, 1912, and so far as he is concerned the question is whether the damages recovered in the action were excessive. He asks only for a new trial.

Dr. Adam contends that his part in the transaction was justified by law, and that at all events he is entitled to the protection afforded by s. 330 of the Act, and that the action as against him cannot be maintained, and he asks for judgment, or in the alternative, for a new trial.

The action was tried in February of this year before Lush J. and a special jury, and occupied the Court for eighteen days. The jury, having answered certain questions put to them by the learned judge, to some of which I will refer more particularly, have returned a verdict for 25,000*l.* damages against the two defendants jointly and one for 5000*l.* against Dr. Bond alone in respect of the detention of the plaintiff at the offices of the Board, "taking into consideration the whole purpose for which he was so detained." The judge after argument directed judgment to be entered against the defendant Dr. Bond for 5000*l.* and against the two defendants jointly for 20,000*l.*

I will deal first with the case of Dr. Adam. He contends that he committed no actionable wrong, but that in taking the plaintiff again into his house on December 14 he was doing no more than he was entitled to do in pursuance of the statute and the orders of November 10 and December 12, 1912, respectively made thereunder, and that even if he was in fact exceeding his powers he was acting bona fide and with reasonable care, and was therefore protected by s. 330.

Throughout the period from November 10, 1912, the date of the reception order, till February 22, 1913, when he was under proper authority removed to Warlingham, the reception order was in force, and except so far as under s. 55

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and the probation order of December 12 the plaintiff was entitled to be at liberty, the defendant, Dr. Adam, committed no wrong either in causing him to be taken back to Malling Place or in subsequently detaining him there. Whether the plaintiff was entitled to be at liberty when Dr. Adam caused him to be taken back to Malling and to be detained there depends on the true construction of s. 55 and of the probation order. The material parts of s. 55 are sub-ss. 3 (*b*), 4 and 5. Sub-s. 3 (*b*) is this: "The manager of any hospital or licensed house may, with such consent as hereinafter mentioned . . . . (*b*) permit a private patient to be absent upon trial for such period as may be thought fit." Sub-s. 4 is: "The consent required by this section shall be either that of a Commissioner, or in the case of a hospital that of two members of the managing committee, or in the case of a house licensed by justices that of two of the visitors." Sub-s. 5 is: "Before such consent is given, the approval in writing of the person on whose petition the reception order was made, or by whom the last payment on account of the lunatic was made, shall be produced, unless the consenting persons, on cause being shown, dispense with the same."

In my judgment there is nothing in this section which requires the period of trial to be a fixed and definite period of so many days or weeks or months. It is obvious that as the absence is "upon trial" the section contemplates that the trial may not prove a success, and to allow absence for a period which could in no event be curtailed might be the worst thing possible in the circumstances for the patient himself. Accordingly, as will be seen, the actual form of order settled by the law officers many years ago and in general use since, while allowing absence "on probation" for so many days, renders that period liable to be curtailed first, by revocation of the order by those who make it, and secondly, by the retaking of the patient by the manager of the licensed house "if his (the patient's) mental condition requires it." In my opinion an order in this form is within the authority given by the statute and is therefore valid.

The order is in the following terms: "We, the

undersigned, being two of the Visiting Justices of Private Asylums for Kent, hereby sanction leave of absence from Malling Place of "—the plaintiff—" on probation for the period of "—twenty-eight days—" but this sanction is revocable by us at any time during that period. Provided that the medical officer shall at any time before the expiration of the said period have power to take back the said patient into the Licensed House, if his mental condition requires it"; and that is signed by two of the visiting justices for Kent.

Dr. Adam says that in taking the plaintiff back to Malling Place he was exercising a power given him by the order. The plaintiff says, first, Dr. Adam had no power to take him back, but only to receive and keep him if he were lawfully sent back by some one else, and secondly, that even this power existed only if the plaintiff's mental condition in fact required its exercise, which he asserts it did not. The jury have found that he was not of unsound mind on the day in question. In my opinion neither of these contentions can be supported. As to the first the words in their natural construction import, in my judgment, an active proceeding on the part of the medical officer and not the merely passive one of receiving the patient when taken to him by some one else. I think "take" in the order in question has the same meaning as the word bears in s. 35, by which authority is given to take the patient to the place named in the reception order, and "take back" has the same meaning as "be retaken" in s. 85 in reference to an escaped patient. As to the second contention, what the mental condition of the patient requires must of necessity be a matter of opinion, and the opinion which is to determine the action of the medical officer must, I think, be that of himself, there being no indication that the opinion of any one else is to be obtained. I need not of course say that such an opinion must be honestly formed and entertained, but in the present case there is no question on this head, inasmuch as the jury have found in answer to questions 13 and 14 that Dr. Adam, when he received the telephone message and sent the car, honestly believed that the plaintiff was on that day of unsound mind and unfit to be at large, and that

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it was in his interest that he should be taken back to Malling Place.

In my opinion, therefore, the defendant Dr. Adam in taking the plaintiff back to Malling Place was acting within the authority given to him by the joint effect of the statute and the reception order and the probation order, and therefore committed no wrong. He was also justified in detaining him at Malling Place until he was removed to Warlingham, the reception order remaining in force and the period of absence on trial having come to an end in accordance with the probation order.

But even if I am wrong in the opinion so far expressed and Dr. Adam was acting without authority, there remains the question whether he was not protected by s. 330. In taking back the patient and in detaining him at Malling Place he was certainly doing acts with a view to carry out the reception order, and was therefore not liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground, if he acted in good faith and with reasonable care. Of his good faith there is no question, but the jury have found in answer to question 15 that he did not take reasonable care in acting as he did. Upon this it was contended on the part of Dr. Adam that the onus lies on the plaintiff to prove want of reasonable care, and that if so there was no case to go to the jury. Considerable support for this view is afforded by the decision of this Court in *Williams* v. *Beaumont* (1) and by the terms of s. 330, sub-s. 2, and I am inclined to think it is right, but I express no decided opinion on the point, because all the evidence has been taken and, in my opinion, on a proper direction the jury could not properly have found the verdict they in fact found. The learned judge unfortunately so directed them that they would naturally conclude that the mere fact that Dr. Adam did not go himself was enough to justify their verdict. With all respect I think this was too narrow a view. If the jury had been told, as they ought to have been, to put themselves in Dr. Adam's place, to bear in mind what he knew of the

(1) 10 Times L. R. 543.

plaintiff's condition a few days before, the source of the information he had received, and the improbability that a personal visit would have made the least difference in his course of action, they ought in my judgment to have found that he acted with reasonable care. I think therefore the verdict in this particular must be set aside on the ground that there was no evidence upon which, upon a proper direction, it could have been found. The result is that, if it is required, Dr. Adam is entitled to the protection of the section. On the whole, I am of opinion, that judgment ought to have been and ought now to be entered for Dr. Adam with costs here and below. In this view there is of course an end of the case of joint tort.

It remains to consider the position of Dr. Bond having regard to the admitted fact that he detained the plaintiff at the office with the intention that Dr. Adam should have an opportunity of taking him back to Malling Place, and that he had no legal authority for so doing. As I have already pointed out the jury assessed the damages against both defendants at 25,000*l.* and the judge directed judgment against both defendants for 20,000*l.*—namely, for the 25,000*l.* after deducting the 5000*l.* next to be mentioned, and against Dr. Bond for the sum of 5000*l.* assessed by the jury against him separately merely for the detention at the office.

In my opinion neither the verdict nor the judgment in respect of damages can be supported. The learned judge told the jury in effect that they might regard the detention of the plaintiff for the whole period of nearly nine years as the result of the defendant's action and assess the damages on that footing, and he repeated that view in giving his judgment. In my opinion both in the summing up and in the judgment the learned judge wrongly applied the principle of law relating to damages to the present case. That principle has recently been elaborately discussed and expounded in the House of Lords in *Weld-Blundell* v. *Stephens* (1) and particularly in the speech of Lord Sumner.

That case establishes that the true principle of law is that

(1) [1920] A. C. 956.

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those damages only can be recovered of which the wrongful act was the direct cause. If the damages are immediately caused by the voluntary acts of persons over whom the defendant has no control and for whose acts he is not answerable then they cannot be recovered from the defendant: see per Lord Sumner (1) and the judgment of Tindal C.J. in *Ward* v. *Weeks* (2), which is cited with approval by both Lords Dunedin and Sumner. (3) Such expressions as "novus actus interveniens" only connote examples of such breaches of causation as prevent the damages in question from being directly caused by the defendant's act. Now was the detention of the plaintiff for any part of the period following December 14, 1912, directly caused by this defendant's act? The taking of the plaintiff back to Malling Place was the lawful act of Dr. Adam acting under the authority of the statute and the orders already referred to. So his subsequent detention there and at the other places to which he was afterwards removed was directly caused by the action of the various medical officers, Commissioners and visitors who had the necessary powers to secure his release, but abstained from exercising them on the ground that they considered him still to be of unsound mind. It is true that the return to Malling Place followed and was rendered possible by the action of Dr. Bond, but it cannot in my opinion be said to be directly caused by it. It was the duty of Dr. Adam to form his own opinion about the proper course to pursue, and over him Dr. Bond had no control, and for him he was not answerable. Still less did he control or was he answerable for the acts of the numerous other persons who could have brought about the plaintiff's release, but did not do so. The learned judge in his judgment expresses the view that acts of omission cannot break the chain of causation. With all respect I cannot adopt this view. I fail to see the distinction between acts of omission and acts of commission in this respect. To abstain from a particular course of action may, and often does, entail

(1) [1920] A. C. 984. (2) 7 Bing. 211, 215.
(3) [1920] A. C. 976, 987.

consequences affecting other people in precisely the same way as does the doing of some particular thing, and they are both voluntary acts of the person concerned. For these reasons I think the damages awarded were too remote, and on this ground alone there must be a new trial. The separate verdict against Dr. Bond is affected by the same vice as the joint verdict against the two defendants. The jury were directed to assess these damages against Dr. Bond "taking into consideration the whole purpose for which the plaintiff was detained" at the office. For the mere detention for two or three hours irrespective of what happened afterwards the 5000*l.* was of course grossly excessive.

Having come to the conclusion that there must be a new trial it is perhaps in strictness unnecessary to consider other objections to the verdict, but in fairness to Dr. Bond I think it right to deal with the answers to questions 7 to 11. These questions and the answers to them were as follows: "(Q.) Did Dr. Bond honestly believe that the plaintiff was of unsound mind? (A.) No. (Q.) Or that he was not fit to be at large? (A.) No. (Q.) Or was dangerous to himself or others? (A.) No. (Q.) Did he believe that the plaintiff had escaped from his brother's charge? If so was that his reason for having him sent back? (A.) Yes. (Q.) Did he take reasonable care to ascertain the true facts? (A.) No." The answers to questions 7, 8 and 9 if justified amount to a serious imputation on the character of Dr. Bond. But I think there was no evidence on which the jury could properly arrive at any such conclusion. There was no evidence that Dr. Bond acted otherwise than in what he honestly believed to be the best interests of the plaintiff himself. But looking at the summing up there is some ground for the view suggested in argument that the jury were not intending to impute to Dr. Bond anything more than that at the time when he sent the telephone message to Malling he had had no opportunity of forming any belief at all upon the plaintiff's mental condition—not having then seen him—but acted solely on the notion that he had escaped

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from his brother's charge. But the telephone message itself as recorded in Dr. Adam's case book seems to me inconsistent with any such idea; no reference is made to the "escape." What is said is that the plaintiff does not appear to be fit to be at large. At all events, if this was all that the jury intended to find, the verdict in the form in which it was returned was not in accordance with such intention, and on that ground must be set aside. The plaintiff may or may not have been detained after he ought to have been discharged; on that question we are not called upon to express any opinion. If he was so detained it was the result of action by other people for whom Dr. Bond was not responsible. If he was not so detained then he has nothing to complain of.

On the whole therefore as against Dr. Bond the verdict and judgment must be set aside and a new trial ordered.

SCRUTTON L.J. This case has naturally and deservedly attracted much public attention. Indeed it has attracted so much attention that there is a danger of the real issue in dispute being confused. It is not an inquiry into the whole working of the Lunacy Laws with regard to the plaintiff, Mr. W. S. Harnett, by a tribunal having power to award him compensation for any injuries he has suffered from the operation of those laws. It is not a Royal Commission to consider in what respects the Lunacy Laws should be amended to avoid the occurrence in future of any errors which have been made in Mr. Harnett's case. It is the trial of a complaint that two named persons over eleven years ago, between December 14, 1912, and February 22, 1913, committed either in combination or independently specified wrongful acts, for the direct consequences of which, if they are found to have acted wrongfully, those two persons must pay damages.

If the inquiry were one into the whole working of the Lunacy Laws in relation to Mr. Harnett, there is considerable ground for thinking that he has been detained as a lunatic for much longer than he ought to have been. If it were a

Royal Commission, this case shows that serious consideration should be given to the question whether the judicial inquiry preceding the making of a reception order should be more precise in its procedure by informing the alleged lunatic of the nature of the charges against him and hearing him in his defence. Another question also requires much thought, whether the existing system of constant visits and reports affords sufficient safeguards against undue prolongations of detention. When those questions are considered it may be found difficult to provide any more practical safeguards than are at present provided, and they must certainly be approached from the point of view of protection of the community as well as that of liberty of the individual. I have already expressed my opinion on these points once in the case of *Everett* v. *Griffiths*. (1) On this occasion I content myself with quoting the language of Lord Moulton in the same case (2), in which I entirely concur: "The Lunacy Acts deal with one of the most difficult subjects that can come before the Legislature. On the one hand it has to protect the individual from the grave peril of the loss of his liberty if a mistake is made as to his mental condition and he is wrongly adjudged to be a lunatic, and on the other hand it has to protect the community from the dangers that would follow from allowing lunatics to go about freely among their fellow men. The Lunacy Acts represent the course that the Legislature has decided upon in view of these rival dangers, and one cannot read them without feeling that the framers of those Acts have striven throughout to safeguard, as far as possible, both the individual and the community. But the way in which this is to be done is a matter for the Legislature and not for the Courts of law. Our duty is loyally to see that those laws are followed, and not to allow ourselves to be turned aside from this our plain duty by arguments as to whether their provisions might wisely be altered in either direction, still less to be influenced by appeals to our feelings by suggestions that they may bear hardly on the individual or the community in any particular case."

(1) [1920] 3 K. B. 163, 197, 198. (2) [1921] 1 A. C. 631, 693.

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In the present case the results are sufficiently startling to call for a careful examination of the legal questions involved. Dr. Bond is one of a number of members of the Board of Control and a professional man of standing, with large experience of persons of unsound mind. He had nothing to do with the original certifying of Mr. Harnett as a lunatic, with the asylum in which he was placed, or with his being let out on probation. He saw Mr. Harnett for the first and last time, until he was free from the asylum, during his detention for parts of three hours on the morning of December 14, 1912. I do not think he had ever heard of Mr. Harnett before that day. He received afterwards a few letters from him, but made no special examination of him. Mr. Harnett was in the next nine years in five places of detention examined by a number of experienced doctors all of whom reported him of unsound mind. The jury found that Dr. Bond when he saw Mr. Harnett believed that he had escaped from the care of his brother, and believed that Dr. Adam, the resident physician of the asylum in which Mr. Harnett had been received, had retained a power to take him back, and that in consequence Dr. Bond sent him back to that asylum to be detained there. In spite of the fact that a number of independent doctors and visitors seeing Mr. Harnett in other asylums had certified that he was of unsound mind, without which certificates he would have been a free man, Dr. Bond, for that three hours' action, has been held liable to pay 25,000*l.* as damages for the whole of the nine years' detention, by a jury who did not see Mr. Harnett at the same time as Dr. Bond did, but eleven years afterwards, when he was admittedly cured. One has to look closely into an eighteen days' trial which has produced this remarkable result.

The relevant facts are shortly these. In 1912 Mr. Harnett was a Kentish farmer of fifty-one years of age. His father and mother were second cousins. His mother had died in an asylum. She also suffered from ovarian tumour. I do not find any evidence whether the ovarian tumour was solely or at all responsible for her state of mind. His elder brother

was described as "Eccentric bordering on insanity for years." His younger brother as "Excitable and very nervous." There was consumption on both his parents' sides, and his sister died of consumption. There is a photograph of Mr. Harnett himself in February, 1913, which enables some judgment to be formed of his mental stability then. In October, 1912, he was suffering from some complaint in the head or nose which led to secretion of stuff variously described as mucus or saliva. His medical attendant after his release discovered it was due to bad teeth. Mr. Harnett at the time thought it was due to infection from his first wife who had died some years before. Failing to get relief from regular medical men he went to a quack doctor at Rochester who injected him with something. I do not find any reliable evidence that it was tuberculin. Mr. Harnett himself disclaims any knowledge that it was tuberculin. Whatever it was, after the injection and very possibly because of it, he had a very severe attack of delirium, followed by a state of religious exaltation in which he certainly did not behave as ordinary Kentish farmers do. In his own view he had recovered his sanity on October 30, when he recovered consciousness. Between then and November 10, when he was certified, he did some very odd things for a sane man. He tried to proceed in a hired motor car to Borstal prison, accompanied by a land agent, a solicitor and his clerk, as guarantees of his respectability and genuineness, to ask the Governor of the prison for permission to preach to prisoners there condemned to death. There were in fact no such prisoners, and Borstal Prison had a chaplain on its staff. He wrote to the local post office, with the staff of which he had a dispute as to the delivery of letters, the following letter: "Dear Post Official," or "Officials," "Jesus has touched my eyes. If I have done wrong I am willing to make things right. I love you. If you love Jesus and love me you will come and see me and make me happy. Yours sincerely, W. S. Harnett, a sinful man." He sent for a reporter from the East Kent Gazette by a telegram of November 9, and dictated a very remarkable account of his visions and state of mind to which I refer without

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reading it. He was certified as a lunatic on November 10 by Dr. Penfold his regular medical attendant who is now dead, by Dr. Fisher, who was called in to see him and against whom he is now bringing an action, was then seen by a local magistrate, Mr. Locke, as the judicial authority under the Lunacy Act; and was taken under a reception order to Malling Place, a private lunatic asylum kept by Dr. Adam, the second defendant. No claim is made against Dr. Adam for the detention from November 10 to December 14. Sect. 35 of the Lunacy Act, 1890, makes the reception order sufficient authority for detention, and by s. 38, a reception order expires at the end of a year at the latest unless continued. By s. 83 it was the duty of Dr. Adam on Mr. Harnett's recovery to send notice to the petitioner, Mr. Harnett's brother, and if no action was taken within seven days, to discharge the patient. Dr. Adam as required by statute reported to the Commissioners on November 17 and again on December 10: "Mentally improved, the acute attack of religious mania having passed off, and have advised leave of absence on probation in this case. Bodily in improved condition, G. H. Adam," and in pursuance of the last report gave Mr. Harnett on December 12 leave on probation under s. 55 of the Act. The leave was given on a standard form, which we were informed had been settled by the law officers. It ran as follows: "We, the undersigned, being two of the Visiting Justices of Private Asylums for Kent, hereby sanction leave of absence from Malling Place"—of Harnett—"on probation for the period of"—there is a blank to be filled in —"but this sanction is revocable by us at any time during that period. Provided that the medical officer shall at any time before the expiration of the said period, have power to take back the said patient into the licensed house, if his mental condition requires it." The period of twenty-eight days was inserted in the blank.

Considerable discussion took place before us as to the rights of the manager of a licensed house to retake during the period of twenty-eight days if in his opinion the condition of the patient should require it. It was argued for the plaintiff

that the condition in the form authorizing the taking back of the patient was beyond the powers conferred by the Act, and that during the twenty-eight days a new certification was necessary if the patient was to be brought back. I cannot assent to this argument. The patient is in the asylum under a reception order which authorizes his detention, but power is given to the manager to permit the patient to be absent "upon trial" for such period as he thinks fit. He might name the period as a fixed one, but as the patient is only out on trial, and the trial may result unsatisfactorily, it would be very unwise to name a fixed period without a power of terminating it and reverting to the original reception order, and I cannot think that the statute prevents the "trial" from being "so long as I think fit." Once the period of trial is terminated, the reception order operates again, and both under the leave of absence order and the reception order, the manager can, in my view, take the patient back, by force if necessary. It cannot be necessary that the manager should go himself and see the patient. He may act on reliable information by his agents, himself seeing the patient on his return, and if he acts honestly and with reasonable care, he is protected by s. 330 of the Act and by the reception order.

What actually happened was this. Dr. Adam thought the patient might be released on probation and in care of his brother. That he told Mr. Harnett this appears from the latter's letter of December 11: "Dr. Adam informs me that my younger brother is coming to-morrow afternoon and that I am to go home under his care. . . . . I object to being sent home under his care. I have demanded to be handed over to the care of the police when I am set free." On this it may be remarked that it was not for Mr. Harnett to settle the terms of his freedom on probation, but for Dr. Adam and the visitors. It is not clear that Mr. Harnett understood that he was on a probation for a limited period and in charge of his brother. Anyhow, when he left the asylum, he objected to his brother's control or presence, and succeeded on the evening of the 12th in parting

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company with him, probably intentionally. A great deal of evidence was given as to his proceedings on December 13. A number of respectable witnesses deposed that they saw him on that day and that there was no trace of insanity in his behaviour; on the other hand, two independent medical men gave evidence of interviews with him, which, if accepted, showed that he was then in a state of great instability of mind coupled with considerable religious excitement. The learned judge unfortunately directed the jury several times on the lines, "Which do you believe?" The truth is, in these mental cases you may believe both. A. comes and says: The man acted in such and such a manner, and I formed the opinion he was sane. B. comes and says: At a later period the man acted in such and such a manner, and I formed the opinion he was then not of sound mind. Both may be accurate, for in a condition of mental instability the mind and its consequent actions may quickly change from normality to abnormality. I tried a case at Exeter Assizes which I suppose, as it was a judicial proceeding, I may report as an illustration. An inmate of an asylum was tried for a calculated assault on an attendant. His defence was that he did it to have an opportunity of proving in public he was of sound mind. He conducted his own defence. For the first hour and a half of the trial he behaved quietly and reasonably, argued with great force and good sense, corrected counsel and the judge quite rightly on facts, and had every appearance of sanity. It would have been possible to call fifty witnesses from those in Court to say that they observed him for an hour and that he conducted himself as if he were perfectly sane. Suddenly some quite irrelevant observation upset his stability and let loose a ridiculous delusion connected with the Royal Family, and in ten minutes he had convinced every one in Court of his insanity. Yet you might have called two sets of witnesses, each only present during one period, who would have given their opposite opinions, both accurately and honestly, and the question would not be, "which do you believe?" but "do you believe those witnesses who depose to facts which are strong evidence of

instability of mind, and what conclusion do you draw from them ? " I do not understand what view the jury took of Dr. Cooper's evidence; whether they thought the facts to which he deposed did not happen, or that some of them did happen, but were accounted for by his excitement over a view he had formed about his wife. On this subject the Court is in some difficulty. Counsel agreed very naturally that it was undesirable to go into the truth or falsehood or even the exact nature of this view. The judge was told, as we were told, in very vague language, so vague as to be almost unintelligible, its nature, but if it produced on Mr. Harnett the extraordinary results that Dr. Cooper deposed to, the language which Lord Haldane used in *Everett* v. *Griffiths* (1) is of great force: "The point is whether at the time of these occurrences he had so lost his capacity for self-control as to be, temporarily at least, to all appearance of unsound mind within the meaning of a statute which takes account of his relations to others as well as to himself."

On the evening of December 13 Mr. Harnett went up to London with no luggage and no money. He cashed a cheque the next morning, December 14, with his hop factors, who saw nothing unusual in his appearance, and he presented himself early that morning, a little after ten, at the office of the Board of Control. Dr. Bond, one of the Commissioners, happened to be the Commissioner on duty; he arrived about eleven o'clock and saw Mr. Harnett after a communication from Mr. Dickinson, the Secretary. Mr. Dickinson says he had seen Mr. Harnett, who was very excited and incoherent, and that he (Dickinson) was unable to understand what Mr. Harnett wanted. Mr. Harnett says he never saw Mr. Dickinson before he saw Dr. Bond. All these gentlemen were giving evidence about what happened thirteen years before. I am not sure what view the jury took of the events of this day. What actually happened clearly was that after one, or I think more, telephone messages to Malling and inspection of the documents on the Commissioners' file,

(1) [1921] 1 A. C. 631, 654.

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Dr. Bond asked Dr. Adam to send a car to take Dr. Harnett back to Malling, and caused him to be detained at the office till the car came. Dr. Adam, on Dr. Bond's information, sent the car to the office and took Mr. Harnett back to Malling. There are three relevant contemporary documents: No. 1, Dr. Adam's entry in his case book dated December 14, and probably made or completed by Monday, December 16; No. 2, Mr. Dickinson's memorandum of interview; and No. 3, Mr. Dickinson's letter of December 18. No. 2 speaks of a telephone message to Dr. Adam before Dr. Bond saw Mr. Harnett; No. 3 speaks of a telephone message after Dr. Bond saw Mr. Harnett; No. 1 records a telephone message about 12 A.M.; No. 2 saying that Harnett had arrived at 10.10 A.M. This looks like two telephone messages, one before Dr. Bond saw Harnett, to ascertain why he was out; one after Dr. Bond saw Harnett to ask Dr. Adam to take him back. The oral evidence was very vague about the telephone messages; it was thirteen years ago, and I do not think the learned judge sufficiently called the attention of the jury to the contemporary documents. The importance of this is that the judge asked the jury (Question 7) did Dr. Bond honestly believe that the plaintiff was of unsound mind? To which they answered, No. It appears, however, from the summing up that he asked them this to ascertain whether Dr. Bond sent the plaintiff back because he thought the plaintiff was of unsound mind, or because he thought the plaintiff had escaped from his brother's charge; and he suggests or justified their answer on the ground that there was only one telephone message before Dr. Bond's interview (contrary to contemporary document No. 3 and inferentially document No. 1), and that therefore Dr. Bond could not have sent him back as of unsound mind, for he had not seen him when he telephoned. The jury found, following the judge's suggestion, that Dr. Bond believed that the plaintiff had escaped from his brother's charge (Answer 10) and that Dr. Adam had retained the power of taking the plaintiff back during the twenty-eight days (Answer 12), as in my opinion in law he had, and that

Dr. Bond sent him back for that reason (Answer 10), but that he did not take reasonable care to ascertain the true facts (Answer 11). In view of my opinion that Dr. Adam had retained the power of retaking, I can see no grounds on which the jury could answer Question 11 as they did. If Dr. Bond's and Mr. Dickinson's account of what happened are anything like accurate, Mr. Harnett was then in a very excited and incoherent condition. He himself says he wanted the Commissioners to send a detective with him to look after him, and showed his money, the proceeds of the cheque, as evidence of his bona fides and ability to pay for the detective. Dr. Bond undoubtedly caused the plaintiff to be detained at the office till the motor came, and the jury found (Answer 17) that this was the act of Dr. Bond and not of both defendants, and (Answer 3, as explained on the sixteenth day and by the original answers of the jury, which we saw) that the "causing to be taken back" was the act of Dr. Bond alone and not done in agreement with Dr. Adam. I postpone for the present the consideration of the legal position here, and state the remaining facts.

When Mr. Harnett returned to Dr. Adam he was under the reception order, and Dr. Bond had nothing further directly to do with his detention, except as one of the Commissioners to whom reports were made from time to time. Mr. Harnett was moved to Croydon Public Asylum on February 22, 1913, under Dr. Pasmore. He remained there till August 24, 1917, when he was moved to Holloway Sanatorium, Virginia Water, and later to its branch at Canford Cliffs. On April 29, 1920, he was moved to Dr. Little's at Aylsham, which he left in October, 1921, by escaping, and was never recertified. During the whole of this time he was examined from time to time by visitors and doctors, entirely independent of Dr. Bond and Dr. Adam. He could not have been detained unless they had certified him of unsound mind, as the reception order would expire automatically without such a certificate in November, 1913, again in November, 1915, and again in November, 1918. Besides this, each manager had a statutory

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duty to certify him on arrival and, if he recovered, to report his recovery. In addition to these independent checks, in 1913, on an inquiry before the Master in Lunacy as to Mr. Harnett's fitness to manage his affairs, with which neither Dr. Bond nor Dr. Adam had anything to do, he was examined by two Chancellor's visitors, unconnected with the Board of Control, and on their reports the Master in Lunacy appointed a receiver. The plaintiff claimed the costs of this receivership as damages resulting from Dr. Bond's and Dr. Adam's action in December, 1912.

As one would expect, objection was taken at the trial to damages being recovered for this detention on the ground that it was too remote from the alleged wrongful acts. The learned judge admitted the evidence, and directed the jury that they might, if they wished, find that the whole nine years' detention was the direct consequence of what the defendants had done in 1912. The most striking passage is on the sixteenth day: "If you think that the detention for these nine years was the direct consequence of his illegal imprisonment, that there was no intervention of third persons at all, but that it follows straight away from the first wrongful act, you can take the whole of that nine years into your consideration. You can take all of it into your consideration. It is so obvious, you know, if Dr. Bond, as you have said he did, caused this man to be detained in an asylum, Dr. Bond would know, as anybody else would know, that he might in the ordinary course have gone on being visited by one visitor and one Commissioner after another, and he might never get out." How the learned judge came to say that it was obvious that anybody would know he might never get out in view of the evidence from Croydon that in two years the recovery rate had averaged 60 per cent. of the patients a year, I do not understand. The learned judge apparently based his view on the reasoning that there was no intervening act, but only a failure to find out that the patient was of sound mind. But the reception order would have lapsed three times but for a positive certification by an independent authority that the patient

was of unsound mind, and the order of the Master in Lunacy, based on independent evidence, was surely an independent act, not a failure to do something.

There is no doubt that the question whether damages are too remote is one of degree, and that it is very difficult to say exactly where the line is to be drawn. I refer to, without repeating at length, what I said in *In re Polemis and Furness, Withy & Co.* (1) Again there is no doubt that the action of a third party does not necessarily break the chain of causation and make subsequent damage too remote. Lord Sumner has classified some of these cases in *Weld-Blundell* v. *Stephens.* (2) But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding. It was on this principle that in *Lock* v. *Ashton* (3) it was decided that a defendant who had wrongfully taken a person into custody and brought him before a magistrate was not liable for the subsequent remand by the magistrate, which was a judicial act. Applying this principle I am clearly of opinion that the liability of either defendant for damages stops when the damage is only continued by the independent act of a person under a legal duty to form an independent opinion. This view sets aside the verdict of the jury for 25,000*l.* for the whole period of detention, with its apportionment into separate damages of 17,500*l.* and 7500*l.* It also strikes out the judge's assessment up to November 10, 1913, because the moment Mr. Harnett got to Croydon in February, 1913, there was an independent duty of the asylum authorities to certify or release him. The remaining figures of damage turn upon what is the exact cause of action, if any, against each defendant; but in my opinion all the minor assessments are so coloured by the wrongful admission of evidence that I should not have allowed them to stand, being obviously apportionments of an inadmissible sum.

(1) [1921] 3 K. B. 560, 576. (2) [1920] A. C. 985.
(3) 12 Q. B. 871.

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First as to Dr. Bond. As a Commissioner of Lunacy he undoubtedly caused Mr. Harnett then at large on trial to be detained until the person who, as I have held, had a right to take him back under certain conditions could reach him and take him back. I cannot find that as a Commissioner of Lunacy he had in this respect any other right than as a member of the public. Commissioners of Lunacy as a body do not appear to have any clear definition of their powers. Sect. 150 of the Act of 1890 says: "There shall continue to be Commissioners in Lunacy," but numerous sections throughout the Act say that one or two Commissioners may or shall do certain things. But I cannot find that a Commissioner, or any member of the public, has any power to detain a person he suspects even rightly to be of unsound mind until he has ascertained whether he is lawfully at large. I think therefore that Dr. Bond, like any other member of the public, did a wrongful act in detaining Mr. Harnett at the Victoria Street office. Both the jury and the judge are clear that this wrongful act was Dr. Bond's alone, and not done in agreement with Dr. Adam. But in my view Dr. Bond's responsibility for damage ceases when Dr. Adam's independent liability begins. It was for Dr. Adam who was the authority under the reception order and the leave of absence order independently to decide whether he would take Mr. Harnett back and detain him, and Dr. Bond was not liable for his decision. He is not liable for Dr. Adam's taking him back, or for his detention for twenty-eight days. In my view the direction that the jury might consider the purpose for which he was detained was a misdirection, if it allowed any damage for the subsequent detention; and also if it assumed that Dr. Adam had no right to take him back under the order if satisfied that his mental condition required it. Under these circumstances, no verdict yet given against Dr. Bond is supportable, but as he has committed an illegal act, the detention at Victoria Street, there must be a new trial to ascertain the damages for that act, which must not include anything for the taking

back to Malling, a subsequent detention by Dr. Adam under the reception order.

As regards Dr. Adam the case is different. The jury have found that he honestly believed that Mr. Harnett was of unsound mind and that it was in his interest he should be taken back to Malling Place, but that he did not take reasonable care in acting as he did. I can see no evidence on which the latter finding can be based. He acted on a statement by a most experienced Commissioner in Lunacy, confirmed by his personal opinion when he saw the patient, and he is found to be honest. In my view he has the protection of s. 330 in the taking back and subsequent detention; he is not liable for the acts of other independent authorities after the patient left Malling, and therefore he is entitled to have judgment entered for him with costs here and below.

Dr. Bond must have the costs of this appeal, and as to the costs of the first trial I agree with the order proposed by the President of the Court.

I would add that I have not expressly dealt with all the points raised in the long argument before us; but I have considered them all and, I hope, expressed my opinion at sufficient length. I have however read carefully the voluminous notes of the trial, which confirm my opinion that the result at which I have arrived is correct. I think the earnest, almost overwhelming, desire of judge and jury to make proper compensation to the plaintiff for misfortunes which they think, probably rightly, he has undeservedly suffered, has prevented them from giving sufficient consideration to their equally strong obligation to do justice to the particular defendants whom the plaintiff is seeking to make liable, and who are not necessarily the persons responsible for every or any wrong the plaintiff has suffered.

Appeal allowed.

Solicitors for the appellant Bond: *The Solicitor to the Ministry of Health.*

Solicitors for the appellant Adam: *Le Brasseur & Oakley.*

Solicitors for the respondent: *Rooper & Whately.*

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NOTE.

Lunacy Act, 1890 (53 Vict. c. 5):—

Sect. 35: "(1.) A reception order, if the same appears to be in conformity with this Act, shall be sufficient authority for the petitioner or any person authorized by him . . . . to take the lunatic and convey him to the place mentioned in such order and for his reception and detention therein, and the order may be acted on without further evidence of the signature or of the jurisdiction of the person making the order."

Sect. 37: "(2.) If a patient is removed temporarily under the provisions of this Act from the place in which he is confined, or is transferred from one place of confinement to another, the original order and certificate or certificates upon which he was received shall remain in force."

Sect. 38: "(1,) Every reception order dated after . . . . this Act, shall expire at the end of one year from its date . . . . unless . . . . continued as hereinafter provided.

"(2.) In the case of any institution for lunatics the Commissioners may by order under their seal direct that the reception orders of patients detained therein shall, unless continued as hereinafter provided, expire on any quarterly day next after the days on which the orders would expire under the last preceding sub-section.

"(3.) An order for the removal of a patient from one custody to another shall not be deemed to be a reception order within this section, but the patient who is removed shall after removal be deemed to be detained under the original reception order as a lunatic, and such order shall expire in accordance with the provisions of this section unless continued as hereinafter provided."

Lunacy Act, 1891 (54 & 55 Vict. c. 65):—

Sect. 7: ". . . . A reception order shall remain in force for a year after the date by this Act or by an order of the Commissioners appointed for it to expire, and thereafter for two years, and thereafter for three years, and after the end of such periods of one, two, and three years for successive periods of five years, if not more than one month nor less than seven days before the expiration of the period at the end of which, as fixed by this Act or by an order of the Commissioners under sub-s. 2 [of s. 38 of the Act of 1890], the order would expire, and of each subsequent period of one, two, three, and five years respectively, a special report of the medical officer of the institution or of the medical attendant of the single patient as to the mental and bodily condition of the patient with a certificate under his hand certifying that the patient is still of unsound mind and a proper person to be detained under care and treatment is sent to the Commissioners."

Lunacy Act, 1890, s. 38:—

"(5.) The person sending the special report shall give to the Commissioners such further information concerning the patient to whom the special report relates as they require.

"(6.) If in the opinion of the Commissioners the special report does not justify the accompanying certificate, then—(*a*) In the case of a patient in a hospital or licensed house or under care as a single patient, the Commissioners shall make further inquiry, and if dissatisfied with the result they or any two of them may by order direct his discharge."

Sect. 39: "(1.) The medical officer for every institution for lunatics, and the medical attendant of every single patient shall at the expiration of one month after the reception of a private patient prepare and send to the Commissioners a report as to the mental and bodily condition of the patient, in such form as the Commissioners direct.

"(2.) The medical officer of every house licensed by justices shall also at the same time send a copy of such report to the clerk of the visitors of licensed houses in the county or borough where the house is situate to be by him laid before the visitors. . . . ."

"(4.) The visitors, after receiving the report, shall, in every case of a private patient in a licensed house in the county or borough for which the visitors are appointed, make arrangements for a visit being paid by the medical visitor (either alone or with one or more of the other visitors) to the patient therein named for such purpose as aforesaid [i.e., for the purpose of reporting to the Commissioners whether the detention of the patient is or is not proper] as soon as conveniently may be; and if on such visit there appears to be any doubt as to the propriety of the detention of the patient, such visitor or visitors shall forthwith report the same in writing to the Commissioners, who shall thereupon make all such further inquiries as may be necessary to satisfy themselves whether the patient is properly detained as a lunatic, or whether he ought to be discharged, or whether the case ought to be reported to the Lord Chancellor with a view to an inquisition.

"(5.) In the case of a single patient the Commissioners, after receiving the report, shall either make arrangements for a visit being paid as soon as conveniently may be to the patient therein named by one or more of the Commissioners, or, if no Commissioner is available, shall cause a copy of the report to be sent to a medical visitor for the county or borough in which the single patient resides, or to some other competent person, and shall direct him to visit the patient therein named as soon as conveniently may be. The Commissioner or Commissioners, or other person visiting the patient, shall report to the Commissioners whether his detention is or is not proper."

Sect. 55: "(1.) Any two visitors of an asylum, with the advice in writing of the medical officer, may permit a patient in the asylum to be absent on trial so long as they think fit."

"(3.) The manager of any hospital or licensed house may, with such consent as hereinafter mentioned,—. . . . (*b*) permit a private patient to be absent upon trial for such period as may be thought fit.

"(4.) The consent required by this section shall be either that of a Commissioner, or in the case of a hospital that of two members of the managing committee, or in the case of a house licensed by justices that of two of the visitors. . . . .

"(5.) Before such consent is given, the approval in writing of the person on whose petition the reception order was made, or by whom the last payment on account of the lunatic was made, shall be produced, unless the consenting persons, on cause being shown, dispense with the same. . . . ."

"(8.) If a person allowed to be absent on trial for any period does not return at the expiration thereof, and a medical certificate certifying that his detention as a lunatic is no longer necessary is not sent to the . . . . manager of the hospital or house, he may at any time within fourteen days after the expiration of the period of trial be retaken as in the case of an escape."

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Sect. 75: "Two of the Commissioners, one of whom shall be a medical and the other a legal Commissioner, may visit a patient detained in any hospital or licensed house, or as a single patient, and may, within seven days after their visit, if the patient appears to them to be detained without sufficient cause, make an order for his discharge."

Sect. 78: "(1.) If after two visits by two visitors to a house licensed by justices, it appears to the visitors that any patient is detained without sufficient cause, the visitors may make such order as they think fit for his discharge.

"(2.) In the case of visits under this section, one of the visitors shall be a medical practitioner.

"(3.) The two visits shall be made by the same visitors at an interval of not less than seven days, ..."

"(5.) The visitors before making an order under this section shall examine the medical officer of the house as to his opinion respecting the fitness of the patient to be discharged, if he tenders himself for examination.

"(6.) If after such examination an order for discharge is made, and the medical officer furnishes to the visitors a statement of his reasons against the discharge, they shall forthwith send the statement to the clerk of the visitors."

Sect. 83: "(1.) The manager of every hospital and licensed house, and a person having charge of a single patient, shall forthwith, upon the recovery of a patient, send notice thereof in the case of a patient not a pauper to the person on whose petition the reception order was made. . . . .

"(2.) The notice shall state that unless the patient is removed within seven days from the date of the notice he will be discharged.

"(3.) In case the patient is not removed within seven days from the date of the notice he shall be forthwith discharged."

Sect. 85: "If any person detained as a lunatic under this Act escapes he may, without a fresh order and certificate or certificates, be retaken at any time within fourteen days after his escape by the manager of the institution for lunatics . . . . or by any one authorized in writing by such manager. . . . ."

Sect. 169: "(1.) For every asylum there shall be a visiting committee, appointed annually by the local authority, consisting of not less than seven members."

Sect. 177: "(1.) The justices of every county and quarter sessions borough not within the immediate jurisdiction of the Commissioners shall . . . . annually appoint three or more justices, and also one medical practitioner, or more, to act as visitors of licensed houses within the county or borough and otherwise for the purposes of this Act."

Sect. 187: "(1.) Two or more Commissioners, of whom one shall be a medical practitioner and one a barrister, shall once at least in each year visit every asylum and shall inquire—(*a*) Whether the provisions of the law have been carried out . . . . (ii.) as to visitation . . . . (iv.) as to the regularity of the admission and discharge of patients . . . . (*h*) as to such other matters as to the visiting Commissioners seem fit.

"(2.) Any one or more of the Commissioners may at any time visit any asylum with the like powers as are by this section given to two or more Commissioners."

Sect. 188: "At least two members of the visiting committee shall together,

once at least in every two months, inspect every part of the asylum, and see every patient therein, so as to give every one, as far as possible, full opportunity of complaint, and examine the order and certificate or certificates for the admission of every lunatic admitted since the last visitation and the general books kept in the asylum; and shall enter in the visitors' book any remarks they think proper in regard to the condition and management of the asylum and the lunatics therein, and shall sign the book upon every visit."

Sect. 191: "(1.) Every hospital and licensed house may at any time, by day or night, be visited by any one or more of the Commissioners . . . ."

"(3.) Every licensed house not within the immediate jurisdiction of the Commissioners shall be visited twice a year by not less than two Commissioners, of whom one shall be a medical practitioner and one a barrister.

"(4.) Every hospital shall be visited once a year by not less than two Commissioners, of whom one shall be a medical practitioner and one a barrister."

Sect. 194: "(1.) The visiting Commissioners and visitors shall, at every visit to a hospital and licensed house which they are by this Act required to make, and any one or more of the Commissioners or visitors may at any other visit do all or any of the following things: . . . . (*b*) See every patient and inquire whether any patient is under restraint and why; (*c*) Inspect the order and certificates or certificate for every patient received since the last visit; . . . . (*f*) Inquire . . . . as to such other matters as may in their opinion require investigation.

"(2.) The result of the foregoing inspections and inquiries, with such observations as may be thought proper, shall be entered in the visitors book."

Sect. 330: "(1.) A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care.

"(2.) If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding sub-section mentioned, or doing anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the Court or judge may think fit, if the Court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care."

W. H. G.

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C. A.
May 21.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

STRICKLAND *v.* PALMER.

Landlord and Tenant—Rent Restriction—Increase of Rent—Rates payable by Landlord—Increase of Rates—Subsequent Reduction—"Amount for the time being payable"—Appeal from County Court—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1; *s.* 2, *sub-s.* 1 (*b*), *sub-s.* 6—*Rent Restrictions (Notices of Increase) Act*, 1923 (13 & 14 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 4.

By s. 2, sub-s. 1, of the Rent (Restrictions) Act, 1920, among the permitted additions to the standard rent of a dwelling-house within the Act, is "(*b*) an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included August 3, 1914."

The rates of a dwelling-house within the Act having been increased above those paid in the period including August 3, 1914, the landlord, by whom the rates were payable, served a valid notice under s. 3, sub-s. 2, of the Act of his intention to increase the rent by virtue of s. 2, sub-s. 1 (*b*), in respect of the increased rates; and the tenant paid the increased rent. The rates were subsequently reduced, and thenceforth the tenant deducted a proportionate amount from the increased rent. The landlord brought an action in the county court to recover the sum of these deductions:—

Held, by the Court of Appeal, reversing the decision of the King's Bench Division, that the landlord was not entitled to recover, inasmuch as the permitted increase was not the amount by which the pre-war rates had at one time been exceeded, but was the amount by which they were exceeded at the time of the claim.

Held, by the King's Bench Division (the Court of Appeal inclining to the same view), that the provision in s. 2, sub-s. 6, of the Act of 1920, that any question arising under s. 2, sub-ss. 1, 2 or 3, is to be determined on the application either of the landlord or the tenant by the county court, whose decision shall be final and conclusive, and the similar provision in s. 2, sub-s. 4, of the Rent Restrictions (Notices of Increase) Act, 1923, touching questions of the amount of arrears due from a tenant, relate only to applications by landlord or tenant to the county court under those enactments, and do not interfere with the general right of appeal to the High Court in an action for arrears of rent.

Appeal from Wandsworth County Court.

The plaintiff was the landlord and the defendant the tenant of a dwelling-house, No. 31, Foxbourne Road, Balham, S.W., which was let at a monthly rent inclusive of rates and was within the scope of the Rent Restriction Acts, 1920 and 1923.

The landlord had in June, 1921, served on the tenant notice of increase of rent under various headings, as permitted by the Rent Restrictions Act, 1920, s. 2, sub-s. 1. (1) Among these was included an amount of 19*s.* 4*d.* per month under para. (*b*) of that sub-section on account of an increase in the rates payable by the landlord from 5*l.* 13*s.* 7*d.* per half year to 11*l.* 9*s.* 7*d.* per half year in respect of the premises. In December, 1921, the amount of the rate payable in the district was reduced by the Borough Council, but the landlord did not reduce the rent in proportion. The tenant then refused to pay the increased rent attributable to the increase in rates, and in 1923 the landlord issued a summons in the Wandsworth County Court claiming arrears of rent on this ground from December, 1921, to May, 1922. At the hearing the amount in dispute was agreed as 4*l.* 7*s.* 6*d.* The facts were admitted, and the only point in dispute was one of law, whether on these facts the Rent Restrictions Acts, 1920 and 1923, required that a reduction in rates should be followed by a reduction in the amount by which the rent had been increased under s. 2, sub-s. 1 (*b*), of the Act of 1920. (1) The county court judge gave judgment in favour of the tenant, but gave leave to appeal

J. Duncan for the tenant. There is a preliminary objection that no appeal lies from the decision of the county court

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 1, provides: "The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows:— . . . . (*b*) an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half yearly or other period which included the third day of August nineteen hundred and fourteen."

Sub-s. 6: "Any question arising under sub-section (1.), (2.), or (3.) of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive."

Rent Restrictions (Notices of Increase) Act, 1923, s. 2, sub-s. 4: "Any question as to the amount of arrears due from a tenant, or the amount of any instalment, shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive."

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judge upon a question under s. 2, sub-s. 1 (*b*), of the Act of 1920, his decision being "final and conclusive" according to s. 2, sub-s. 6, and Rent Restrictions (Notices of Increase) Act, 1923, s. 2, sub-s. 4. (1) The whole tendency of the Act is to confine the decision of questions of this kind to the county court. Thus by s. 17 of the Act of 1920 the Lord Chancellor may make rules for the purpose of giving effect to the Act and for the remission of fees, and (sub-s. 2) a county court may deal with any claim arising out of the Act, although the case would actually be outside the jurisdiction of the county court, and if a person takes proceedings under the Act which he could have taken in the county court he is not entitled to recover any costs.

L. S. Fletcher for the landlord. Upon the preliminary objection s. 2, sub-s. 6, of the Act of 1920 does not apply. For there was here no "application" by the landlord or the tenant to the county court judge as arbitrator. The proceedings were commenced by summons in the county court by the landlord claiming arrears of rent by virtue of the Act. The question which the judge had to decide was not one of amount only, but of principle. The provision in s. 2, sub-s. 6, and in the Act of 1923, s. 2, sub-s. 4, applies only where there is an application by one of the parties upon a question of amount. The county court judge here decided in the tenant's favour upon the general construction of the section, and from such a decision the ordinary rules as to an appeal from the county court prevail.

[The Court then decided to hear the appeal on the merits before deciding the preliminary objection as to jurisdiction.]

The main point arising on this appeal is whether the landlord must reduce the rent where there is a reduction in rates after he has given valid notice of increase under s. 2, sub-s. 1 (*b*). There is power under paras. (*a*) and (*d*) of that sub-section to suspend the increase in rent where it is in respect of repairs for which the landlord is liable and which he has failed to execute, but there is no corresponding power under paras. (*b*) and (*c*). Moreover, by s. 3, sub-s. 2,

(1) See note (1) ante, p. 573.

where a notice of increase is valid at the time it is served, the increase may be continued without service of fresh notice.

[SHEARMAN J. That only dispenses with the need for service of fresh notice.]

Seeing that there is no provision in the Act to the contrary it must be presumed that when a valid increase is once effected under the Act, that increase continues. The House Letting and Rating (Scotland) Act, 1920, contains express provision by s. 1, sub-s. 1, that where the rates for which the owner is responsible are reduced, he shall allow the occupier a corresponding deduction from the rent. There is no such provision in the Rent Restrictions Act, 1920, which was passed shortly afterwards, nor in the amending Act, 1923, compelling the landlord to reduce. The words "for the time being" in s. 2, sub-s. 1 (*b*), of the Act of 1920, refer to the time when the increase is made. The present question was expressly left open by the Court of Appeal in *Sutton & Sons* v. *Hollerton*. (1) By s. 12, sub-s. 1 (*d*), any increase in rates payable by a landlord is to be "deemed payable by him until the rate is next demanded." If the tenant's contention were to prevail great difficulties would arise in giving effect to the reduction, having regard to this last provision: there would be no certainty as to the amount of rent due and no clear rule as to the date from which the rent should be reduced, if that should become necessary.

Duncan for the tenant. If the amount which the landlord had to pay in respect of rates has been reduced, he cannot charge the tenant the higher amount previously payable. Such an increase would exceed the standard rent by more than the amount permitted under the Act of 1920, and by s. 1 of that Act would be irrecoverable from the tenant. The words "for the time being" in s. 1, sub-s. 2 (*b*), refer to the period in respect of which the landlord is claiming. It would require express legislation to enable the landlord to demand payment in respect of rates for which he was no longer chargeable. In *Nicholson* v. *Jackson* (2) it was held that

(1) [1918] W. N. 237.
(2) [1921] W. N. 251; 90 L. J. (K. B.) 1121.

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where a landlord who was liable for poor rates was allowed a commission on the amount thereof, he was only entitled to increase the rent under the Increase of Rent, &c., Act, 1915, by the net sum actually payable by him after deducting commission.

No reply was called for.

SHEARMAN J. In this action, in which the facts were agreed, the plaintiff as landlord sued the defendant, his tenant, for arrears of rent alleged to be due for premises to which the Rent Restrictions Acts apply. The tenant argued that whereas this increase was permitted under the Act of 1920, s. 2, sub-s. 1 (*b*), in respect of an increase in rates, there has since been a reduction in rates and that a corresponding reduction in rent should be made. He said that the Rent Restrictions, &c., Acts, 1920 and 1923, formed a code under which the lower rent alone was recoverable, and the county court judge so held. Upon appeal to this Court two points have been raised. The first is a preliminary objection that by the joint effect of s. 2, sub-s. 1 (*b*), and sub-s. 6 of the Act of 1920, the decision of the county court judge here is "final and conclusive." The words "final and conclusive" in s. 2, sub-s. 6, are admitted to mean that there shall be no appeal from the decision of the county court, and it is said that no appeal will lie in this case, although the question at issue is not one merely of amount but also of principle. The point is not without difficulty, but in my judgment that view is incorrect and an appeal does lie. It is provided by s. 17, sub-s. 1, of the Act of 1920, that the Lord Chancellor may make rules and give directions for the purpose of giving effect to the Act and (sub-s. 2) that a county court shall have jurisdiction to deal with claims arising out of the Act, even if the case would ordinarily be outside the jurisdiction of the county court, and "if a person takes proceedings under the Act in the High Court which he could have taken in the county court he shall not be entitled to recover any costs." Under this section the High Court is not deprived of jurisdiction, for the decision of the county court is not made final

and conclusive: but, by the provision as to costs, proceedings in the High Court are discouraged. It is clear therefore that those statutes apply which give a limited right of appeal from the county court—that is to say, the facts as found by the county court judge are binding, but points of law if taken in the county court may be argued on appeal. The question is whether an action brought by a landlord for rent due is brought within the Act of 1920, s. 2, sub-s. 1 (*b*), and sub-s. 6. In order to decide this one must look at the Rent Restrictions Act, 1920, and at the Rent Restrictions (Notices of Increase) Act, 1923. The Act of 1920, s. 1, provides that where the rent of a dwelling house to which the Act applies exceeds the standard rent by more than the amount permitted under the Act, "the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant." The tenant has thus a defence to an ordinary action for rent, and the Act does not say that the decision of the county court judge in such an action shall be final and conclusive, but only upon questions arising under s. 2, sub-ss. 1, 2 or 3. Similarly by s. 12, sub-s. 3, of the same Act, the county court judge may upon application by either party make an apportionment of the rent, and his decision is "final and conclusive." By the Rent Restrictions (Notices of Increase) Act, 1923, s. 2, sub-s. 4, any question as to the amount of arrears due from a tenant or the amount of any instalment is to be determined, on the application either of the landlord or tenant, by the county court, and the decision of the court is to be final and conclusive. This must be read in conjunction with s. 2, sub-s. 1 (*b*), of the Act of 1920, and also with sub-s. 6 of the same section, which speaks of questions under s. 2, sub-ss. 1, 2 or 3, being determined "on the application" either of the landlord or the tenant. It does not appear that these sections were intended to interfere with the general right of appeal where the judge is hearing an ordinary action, but that in certain cases it was to be open to the parties to make application to the judge as arbitrator on questions of administration. Here the action was for rent, particulars of the claim being given. It was not a

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question arising on the express application of landlord or tenant under s. 2, sub-s. 6, of the Act, and therefore an appeal will lie, leave for such appeal having been given.

The main question in the case, which is without authority, is whether the landlord can continue to charge an increase in rates as an increase in rent if the amount of rates for which the landlord is liable is subsequently reduced by the local authority. This cannot be determined from the standpoint of ethics, but only from the words of the Act itself. The Act was intended for the protection of the tenant, and any excess of rent over the standard rent is irrecoverable from the tenant; but power is given to the landlord to increase the rent and recover the increase in certain cases. This is only allowed subject to stringent conditions—that is to say, that he shall serve a valid notice of increase which shall only take effect after the lapse of a certain time. Thus, where as in this case the rates payable by him are increased he can charge an increased rent, a renewed implied tenancy being created. It is said that that right is given for certain consideration, but I find no provision in the Act by which the length of this tenancy is to be limited or by which such a tenancy is to come to an end on the happening of any contingency; nor do I find any machinery for bringing to an end the new conditions as to rent. Where the landlord is responsible for repairs, then in case of non-repair, the tenant may apply to the court for a reduction of rent. But there is no provision in the case of an increase of rent under s. 2, sub-s. 1 (*b*), by which the tenant can give notice claiming that he shall pay a lower rent, or that the landlord shall serve a fresh notice in order to preserve the increase.

The Act allows an increase in rent where the rates payable by the landlord are increased, but it does not provide that the increase shall fall automatically with the fall in rates. In s. 2, sub-s. 1 (*b*), the phrase "for the time being" is used and not "at the time being," and it is said that that indicates that the amount of the increase in rent shall vary from time to time according to the amount of the rate from time to time in force, but I cannot find in that distinction sufficient

indication of a scheme in the Act for reducing the existing increase of rent.

In my judgment therefore this appeal must be allowed.

ACTON J. I agree with my Lord and have nothing to add as to the preliminary objection. Upon the substantial point, in my opinion the true view is that where there is an increase in the rates payable by the landlord and the rent is increased by valid notice in accordance with the Act, a subsequent reduction in rates cannot affect this increase. If the increase is valid, nothing which happens afterwards will invalidate it. The Act contains no provision for such a contingency, either in the form of notices, regulations as to procedure or otherwise. The contention of the tenant cannot therefore prevail.

Appeal allowed.

F. P. F.

The tenant appealed.

Entwistle for the appellant.

L. S. Fletcher and *Rhymer* for the respondent.

BANKES L.J. This appeal involves the small sum of 4*l.* 7*s.* 6*d.*, but it raises a difficult and important question. Our decision may lead to further difficulties, but we must decide according to what we consider to be the true construction of the statute.

The landlord, who was the plaintiff in the action and is the respondent on this appeal, sued the tenant for the amount in dispute, which he said was due to him as portion of the rent of the demised premises. The tenant said that the sum was in excess of the amount which the respondent was entitled to charge. The house was one to which the Rent (Restrictions) Act, 1920, applied. The respondent had increased the rent, having duly served the notice required by the Act. The increase included a sum equal to the increase in the amount then payable by him in respect of rates over the corresponding amount paid in respect of the half yearly period, which included August 3, 1914. For some time after

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August 1, 1921, the tenant paid the increased rent. In December, 1921, the local authority reduced the rates payable in the district.

The appellant, the tenant, now contends that when the rates were reduced the respondent was under an obligation to make a corresponding abatement of the increased rent, and the amount in dispute is the difference between the increased rent and the amount by which the appellant says the increased rent ought to abate in consequence of the decrease in the rates. The matter came before the county court at the instance of the landlord claiming arrears of rent under the ordinary process of the court. The tenant did not raise any special or formal defence, but merely appeared and relied on s. 1 of the Act of 1920, which says that if the increased rent exceeds the standard rent by more than the amount permitted by the Act, the excess, notwithstanding any agreement to the contrary, is irrecoverable from the tenant; and insisted that the sum claimed was in excess of the permitted increase. The county court judge decided in favour of the tenant. The landlord appealed to the Divisional Court. Before that Court the tenant relied on two points; first that, whether right or wrong, the decision of the county court was final and that no appeal lay; and secondly that, assuming an appeal lay, the county court judge was right in his construction of the Act. On the first point the Divisional Court decided against the tenant, and I think rightly. That point turns on the construction of s. 2, sub-s. 6, which in my opinion refers to special applications made by either party and decisions on such applications. The procedure on these applications is regulated by the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920. I do not think the present case comes within s. 2, sub-s. 6, at all. If the question now raised had come before the county court by way of an application under that sub-section it may be that no appeal would lie. Upon that I say nothing. In the present case there was nothing in the nature of an application under sub-ss. (1.), (2.), or (3.) of that section. The question

was raised by way of defence to an ordinary action in the county court.

The next point taken by the tenant was that the county court judge had given the Act its proper construction; that s. 1, sub-s. 1, provides in terms that where the rent of a house has been increased, then, if the increased rent exceeds by more than the amount permitted the standard rent, the amount of the excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant; that the rent claimed does so exceed the standard rent because, although the claim of 4*l.* 6*s.* 7*d.* was warranted by the increased rates in June, 1921, so long as they lasted, it was not warranted by the rates made in December of that year, because by s. 2, sub-s. 1 (*b*), the permitted addition to the standard rent is not the increase in the amount payable for rates in June, 1921, or at any other specified date, over the pre-war rate, but is the increase "in the amount for the time being payable" for rates over the pre-war rate; and therefore, by the force of the words "increase in the amount for the time being payable," unless the landlord reduces the increased rent by the amount by which the rates on this house have been reduced he is claiming a rent above what the Act permits.

On the other hand the landlord contends that a rent once raised in accordance with the Act is raised for ever; he points out that there is no machinery enabling the county court judge to reduce a rent which has been justifiably increased. Now with respect to some of the heads of permitted increase contained in s. 2, sub-s. 1, it is true that an increase once made will continue; for example, under sub-s. 1 (*a*), where the landlord has incurred expenditure in improvements or structural alterations, the permitted increase is a rate per cent. per annum on the amount expended; and under sub-s. 1 (*c*) the permitted increase is an amount per cent. on the net rent. The addition to the rent permitted under those heads would continue; but these headings contain no such words as appear in heading (*b*), where the permitted addition is an increase in the amount for the time

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being payable. In my opinion it is plain that a landlord who makes a claim for an increase of rent on account of an increase in the amount payable for rates must be in a position to show that the increase he claims does not exceed the difference between the pre-war rate and the amount actually payable in respect of rates on the demised premises at the time of the claim. If that is so, the county court judge was right. The landlord insists that this was never intended by the Legislature; but s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923 (1), which was referred to by Scrutton L.J., shows conclusively the intention of the Legislature. The county court is given power to determine summarily questions of the rent, standard rent, or net rent of any dwelling-house to which the Act of 1920 applies or of the increase of rent permitted under that Act or Part I. of the same Act of 1923. Those increases include increases permitted by s. 7—namely, when part of a dwelling-house is sub-let and the sub-let portion is itself a dwelling-house, ten per cent of the net rent of the dwelling-house comprised in the sub-tenancy may be added to the rent of that dwelling-house and five per cent. of the net rent of the dwelling-house comprised in the sub-tenancy may be added to the rent of the dwelling-house comprised in the tenancy. It is inconceivable that this increase should be allowed to continue beyond the duration of the sub-tenancy. Therefore, on this part of the case I think the county court judge was right and the Divisional Court wrong. Their judgment rests on the supposed effect of the statutory condition that the landlord before increasing the standard rent shall give a valid notice of the increase; that notice pre-supposes a notice to quit; therefore, in the view of the Divisional Court, there is created a new implied tenancy under which the tenant agrees to pay the increased rent and remains under an obligation to pay it notwithstanding that the basis of the increase has ceased to exist. I cannot accept that view as applicable to this case; but even if it was right, s. 1 of the Act of 1920 provides that if the increased rent

(1) 13 & 14 Geo. 5, c. 32.

exceeds the standard rent by more than the amount permitted, the amount of the excess is irrecoverable, "notwithstanding any agreement to the contrary." For these reasons I think the appeal must be allowed.

SCRUTTON L.J. I am of the same opinion. The difficulty in this case arises because the Legislature in express terms allows a landlord to claim a rent in excess of the standard rent if the rates have increased, but omits to say what is to happen if the rates are afterwards lowered, though apparently provision is made for this contingency in the Act relating to Scotland. (1) The landlord had justifiably served notice to increase the rent because the rates had increased; can he go on demanding the increased rent when the rates are now lowered? The Legislature, at a time when houses were very scarce and rents were increasing, fixed a standard rent for houses below a certain value and forbade any increase of rent above the standard rent. Afterwards, for good and sufficient reasons, they permitted landlords to increase the rent within limits, provided that they complied with specified qualifications and conditions. But before any permission is given it is provided by s. 1 that where the rent of a house has been increased, then if the increased rent exceeds the standard rent by more than the amount permitted, the amount of the excess shall, notwithstanding any agreement to the contrary, be irrecoverable. Therefore the landlord must not ask more, and the tenant cannot bind himself to pay more, than the standard rent and the permitted increase. In the present case the landlord is demanding an excess over the standard rent. Therefore he has to justify his demand, otherwise he cannot recover it. He seeks to justify under s. 2, sub-s. 1 (*b*), and says that the amount he claims is the amount by which the rates on the house have been increased. The tenant replies that that was true enough in 1921, but that in 1922 the rates had been lowered, and that the landlord can only claim to add to the standard rent the amount by which the rate in 1922 exceeds the pre-war rate;

(1) The House-Letting and Rating (Scotland) Act, 1920 (10 Geo. 5, c. 8), s. 1.

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this, he urges, is the effect of the words "any increase in the amount for the time being payable," which certainly do not mean that an increase once made is to be taken as lasting for all time. He also contends that the wording of s. 12, sub-s. 1 (*d*), "any increase in rates payable by a landlord shall be deemed to be payable by him until the rate is next demanded," shows that the increase of rates payable is not a fixed amount, but one which may vary at the time of each demand. Against this the landlord points out the elaborate machinery provided for increasing the rent, including detailed notices and instructions and ending with an explanation that some of the permitted increases may be suspended if certain things happen; and by contrast the entire absence of provision for reducing the rent if the rate payable on the house is reduced, or for ascertaining the amount by which the rent may be varied if the periods covered by the rent and the rate respectively do not coincide. These forcible comments suggest future trouble; but s. 1 of the Act requires the landlord to justify any excess over the standard rent, and s. 2, sub-s. 1 (*b*), only permits him to add an increase in the amount for the time being payable by him in respect of rates over the corresponding payment before the war, and therefore when he claims to increase the rent he must show that he is paying as increased rate the amount he is claiming as increased rent.

A point was taken that the decision of the county court was final on this point. Whatever may be the position in a specific application to the county court, the question in this case arose in an action within the ordinary jurisdiction of the county court, and in those circumstances it is better that an appeal should lie, for decisions of the Supreme Court are binding on the county courts, but a decision of one county court does not bind the others.

ATKIN L.J. This is an important case, because it must affect many tenancies within the Rent (Restrictions) Acts, and particularly important, because the decision of the Divisional Court is contrary to the spirit of those Acts. Most

tenancies within those Acts are weekly tenancies, by the terms of which the landlord pays the rates. The system is that the landlord cannot raise the rent above the pre-war rent. Modifications of that system have been allowed, but the standard rent is still the basis of the system, and upon that standard rent the landlord is allowed to make certain increases. Any other increase is not allowed, even though the tenant has agreed to pay it. One of these permitted increases is allowed where the landlord has had to pay an increased amount out of pocket because of an increase in the rates; then to the extent to which he actually pays he may make an addition to the standard rent, but only to the extent of his out of pocket payment. This was plainly laid down by the House of Lords in *Nicholson* v. *Jackson* (1), where it was held that a landlord who had compounded with the rating authority for payment of rates on a house was only allowed to add to the standard rent of the house the amount actually paid under the composition in respect of the house. By s. 1 of the Act of 1920 if the increased rent exceeds the standard rent by more than the permitted amount, the amount of the excess is, notwithstanding any agreement to the contrary, irrecoverable; and the permitted amount is an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in the period including August 3, 1914. It is common knowledge that rates vary from time to time, and not necessarily by increasing; they may even diminish: and when the Act speaks of an increase over the pre-war rates and describes it as an increase in the amount for the time being payable by the landlord, it is fair to impute to the Legislature the plain meaning of the words—namely, that accordingly as the landlord has to pay increased rates so he may add to the standard rent; but only to the extent to which for the time being the rates exceed the pre-war rates. To make this doubly sure, s. 12, sub-s. 1 (*d*), provides that "any increase in rates payable by a landlord shall be deemed to be payable

(1) [1921] W. N. 251; 90 L. J. (K. B.) 1121.

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by him until the rate is next demanded." If that interpretation is read into s. 2, sub-s. 1 (*b*), the permitted increase is "an amount not exceeding any increase in the amount for the time being payable by the landlord until the rate is next demanded"—that increase over the pre-war rate. Those two sections show the spirit of the Act, and in my opinion the county court judge has rightly apprehended it.

The Divisional Court seems to have taken the view that when the increase has been made, and the increased rent paid, there is a new tenancy which cannot be altered unless some relief is given to the tenant; and no machinery is provided for granting relief. The answer to that is that the increase in so far as it is not permitted is null and void, and no further machinery is necessary. The landlord can only recover as increased rent the difference between the rate he is then paying and the pre-war rate, and if he has given a notice of increase by more than that, the tenant can make the necessary deduction for himself. As a rule dwelling-houses under the Act are let on weekly tenancies, but some are on monthly tenancies, and there must be some cases where the rent is payable quarterly or half yearly; but still by s. 2 of the Apportionment Act, 1870, the rent accrues from day to day, and there is no difficulty in making the deduction during the period when the decrease in the rate has had effect. Counsel for the respondent contended that when an effective notice of increase has been given because of an increase of rate, the increased rent must stand as the rent of the dwelling-house. But it only stands for the time being.

A further point was raised; it was said that this was a question arising under sub-s. 1 of s. 2, and that by sub-s. 6 any question arising under sub-s. 1 shall be determined by the county court and the decision of the court shall be final and conclusive. I doubt whether the claim in this case, a claim to recover rent, was a question arising under sub-s. 1. The Rules of Court regulating the procedure under s. 2 do not provide for coercive money orders. But further, the question whether a tenant has paid the rent often arises in

actions for the recovery of possession. It would be most inconvenient if the landlord could not try that question in the action. I incline to the view that if the question arises independently of the general jurisdiction of the county court, and if the parties go before the county court judge and he decides the matter on a special application, his decision would be final and binding at any rate upon him; but that where no such application is made, the general jurisdiction of the county court is not excluded, and that the court has still jurisdiction to say whether the standard rent with the permitted increases has or has not been paid.

Appeal allowed.

Solicitors for appellant: *Bono & Nimmo.*
Solicitor for respondent: *W. H. House.*

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

DURNFORD *v.* BAKER.

[1923. D. 451.]

Husband and Wife—Divorce Suit by Wife—Wife's Costs—"Necessaries"—Misconduct of Wife—Non-disclosure to her Solicitor—Abandonment of Divorce Petition—Liability of Husband to Wife's Solicitor for Costs.

A wife, who had been guilty of adultery which was unknown to her husband, instructed a solicitor to commence proceedings against her husband for divorce on the grounds of his adultery and cruelty. The solicitor, who was not told of his client's adultery, made inquiries and had reasonable grounds for thinking that the charges of adultery and cruelty against the husband would be made out, and accordingly presented a divorce petition. Subsequently the husband discovered his wife's adultery, and on the wife's solicitor being informed of the fact the divorce petition was abandoned. The wife's solicitor then claimed in an action based on the wife's agency of necessity at common law to recover the costs of the petition from the husband:—

Held (by the Court of Appeal, affirming the decision of Rowlatt J.), that the solicitor was not entitled to recover, because, although he had reasonable grounds for believing that the charges of adultery and

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cruelty would be established against the husband, he had to take the risk of his own client, the wife, misinforming him as to her own conduct, and as she had committed adultery she was not entitled to pledge her husband's credit for the costs of her divorce petition.

ACTION tried before Rowlatt J.

The plaintiff, who was a solicitor, sued the defendant to recover a bill of costs in respect of professional services rendered by him as a solicitor to the defendant's wife in divorce proceedings.

In September, 1921, the defendant's wife told the plaintiff that she wanted to commence proceedings against her husband for a divorce on the ground of his adultery and cruelty. She also told him that she had been a good wife, and that there was nothing against her. The plaintiff thereupon made inquiries, and ascertained that the defendant had committed adultery. He also obtained a certificate from the defendant's wife's doctor, from which it was reasonable to suppose that the charge of cruelty would be established. A petition for divorce was duly presented by the plaintiff, acting on behalf of the defendant's wife, which was based upon allegations of adultery and cruelty. The defendant's solicitor subsequently informed the plaintiff that the defendant admitted having committed adultery, and told him where it had been committed and how it could be proved, but that the defendant denied that he had been guilty of cruelty towards his wife. The defendant subsequently discovered that his wife had committed adultery, and on this fact being communicated to the plaintiff the petition for divorce was not proceeded with and was dismissed for want of prosecution. The plaintiff did not know at the time the petition was presented that his client, the defendant's wife, had committed adultery.

Charles K.C. and *Acton Pile* for the plaintiff. The plaintiff is entitled to recover the costs of the divorce proceedings brought by the defendant's wife against the defendant, because in instituting the proceedings he acted with diligence and on reasonable grounds: see *In re Hooper* (1), per Turner L.J.

(1) (1864) 33 L. J. (Ch.) 300, 304.

The Court will only exercise its power and disallow a wife's costs where the wife's attorney has been guilty of some misconduct or has instituted the proceedings without reasonable ground: *Flower* v. *Flower*. (1) It is immaterial whether the proceedings are successful or not provided they were instituted reasonably. The costs of divorce proceedings justifiably instituted by a wife against her husband are "necessaries" for which she may pledge her husband's credit: *Stocken* v. *Pattrick*. (2)

F. Hinde and *A. C. D. Jackson* for the defendant. The defendant's wife at the time she consulted the plaintiff and instructed him to commence proceedings against her husband, the defendant, for a divorce was herself guilty of adultery. A wife who is living apart from her husband in adultery has no authority to pledge his credit to a solicitor any more than to an ordinary trader: see Lush's Law of Husband and Wife, 3rd ed., p. 424. The wife's conduct goes to the root of her authority, and the fact that her solicitor acted reasonably in instituting the proceedings is immaterial. In the present case the petition failed by reason of the wife's misconduct. Turner L.J. in *In re Hooper* (3) expressed his dissent from the argument that it was immaterial whether the suit would have succeeded or not if it had gone to trial, provided the wife's solicitor thought there were reasonable grounds for instituting it. He expressed the view that the wife's solicitor must show that the proceedings which he took were for necessaries, and that it would depend upon the result of the trial whether they were necessaries or not. That case was considered in *Taylor* v. *Hailstone* (4), where Mathew J. said that "unless the necessity for the proceedings is made out in point of fact, the husband cannot be made liable." The plaintiff admittedly could not recover any of the costs in the proceedings in the Divorce Court. Nevertheless he is asking this Court in proceedings at common law to apply principles applicable in the Divorce Court which were laid down when the wife had no property of her own. Since the passing of the

(1) (1873) L. R. 3 P. & M. 132.
(2) (1873) 29 L. T. 507.
(3) 33 L. J. (Ch.) 305.
(4) (1882) 52 L. J. (Q. B.) 101, 102.

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Married Women's Property Acts a wife who has separate property would probably be held to have no longer the right to pledge her husband's credit for costs unless his misconduct rendered them necessary and her solicitor would have to look to her alone for payment: see Lush on Husband and Wife, p. 433. There is a distinction between a case where proceedings for divorce are taken against a wife who has been guilty of adultery and a case where the proceedings are instituted by the guilty wife. In the one case she is entitled to pledge her husband's credit in order to defend herself against the charges brought against her by her husband, but where she herself institutes the proceedings she is not entitled to pledge her husband's credit for her costs: see *Otway* v. *Otway*. (1) In *Ottaway* v. *Hamilton* (2) the wife had succeeded in proceedings for divorce and an order had been made for costs in her favour, and it was held that her solicitor could bring an action at common law against the husband in order to recover the costs reasonably incurred by him beyond the costs taxed and allowed in the Divorce Court as between party and party. But that case does not decide that a wife guilty of adultery is entitled to consult a solicitor and instruct him to bring a petition for divorce against her husband, and by so doing to pledge her husband's credit for her costs so as to enable her solicitor to sue him for the costs of the petition. The fact that the husband's solicitor informed the wife's solicitor that the husband had committed adultery did not amount to an invitation to the wife's solicitor to take proceedings and so remove her disability, because at that time the husband did not know of his wife's misconduct, which had already taken place, and while willing that there should be a judicial separation he would not agree to a divorce.

Charles K.C. and *Acton Pile* in reply. The principle was laid down in *Huntly-Gordon* v. *Huntly-Gordon* (3) that if costs have been reasonably incurred on behalf of a wife in presenting a case of a reasonable character where the charges she brings against her husband have substance in them so that she was

(1) (1888) 13 P. D. 141, 155. (2) (1878) 3 C. P. D. 393.
(3) (1908) 24 Times L. R. 806.

justified in going to a solicitor, the wife is entitled to an order for payment by her husband of her costs though she has failed to establish her case at the trial. The test is whether there is substance in the wife's complaint. There is no evidence that the defendant's wife in the present case was living in adultery when she consulted the plaintiff, and he could not have discovered her adultery by any reasonable inquiries. In *Brown* v. *Ackroyd* (1) Lord Campbell C.J. said: "If the husband threatens to commit violence, she [the wife] may exhibit articles of the peace against him, and he will be liable for the expenses. . . . . Therefore, where there exist such facts as justify a divorce a mensâ et toro, the wife may seek the divorce and must have the means. Neither do I agree . . . . that it is necessary, in such an action as this, for the proctor to shew that there was full evidence of facts necessarily entitling the wife to the divorce a mensâ et toro . . . . it would be too much to say that there ought to be conclusive evidence of this in order to entitle the proctor to recover: it is enough if there is reasonable cause for the proceeding. . . . . The rule, therefore, is that the proctor must shew that there was reasonable cause for instituting the proceeding; if more were required, it would be merely illusory to say that the wife had the power to pledge the husband's credit." A wife, even although guilty of misconduct, is entitled to bring a petition for divorce, because the discretion of the Court may be exercised in her favour, and therefore until the result of the divorce proceedings is known it cannot be said that a wife is disqualified by her own misconduct from presenting the petition. If the solicitor knew of the wife's misconduct when the petition was presented he would have instituted proceedings without reasonable ground, but a solicitor ought not to be compelled to stake his chance of remuneration upon his judgment as to whether the charges against the husband could be made out: see *Flower* v. *Flower*. (2) The order for costs is made not for the protection of the wife but for the protection of her

(1) (1856) 5 E. & B. 819, 826.

(2) L. R. 3 P. & M. 134.

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solicitor. Sir G. Jessel M.R. in *Robertson* v. *Robertson* (1) said: "If he [the solicitor] himself conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful." Cotton L.J. also said (2): "When the wife has to take proceedings against her husband, or he against her—all her property being in him—she ought to be provided at his expense with the means of bringing her case before the Court or of properly defending the case brought against her; and whether she is successful or not, in my opinion the rule is to this effect, that the costs properly incurred in bringing her suit before the Court, or in defending the attack made on her, ought to be paid by her husband." In *Ash* v. *Ash* (3) the test applied was whether the petitioner's solicitors acted reasonably in instituting and continuing divorce proceedings. The plaintiff had reasonable ground for instituting the divorce proceedings having regard to the doctor's certificate and evidence. The evidence as to the effect of the defendant's conduct on the wife's health was very similar to that in *Bethune* v. *Bethune* (4), where it was held that the medical evidence brought the case within *Kelly* v. *Kelly* (5) and amounted to proof of cruelty: see also *Moss* v. *Moss*. (6) The conduct of the husband's solicitor in informing the wife's solicitor of the evidence as to the husband's adultery amounted to an invitation to take proceedings against the husband and to an implied promise to pay the wife's solicitor's costs in bringing the petition.

[*Shepherd* v. *Mackoul* (7) was also cited.]

F. Hinde referred to *Walker* v. *Walker and Lawson*. (8)

ROWLATT J. The plaintiff, who is a solicitor, brings this action against the defendant to recover a bill of costs in respect of services rendered to the defendant's wife in conducting a divorce petition for her. It appears that in September,

(1) (1881) 6 P. D. 119, 122.
(2) Ibid. 125.
(3) [1893] P. 222.
(4) [1891] P. 205.
(5) (1869) L. R. 2 P. & M. 31, 59.
(6) [1916] P. 155.
(7) (1813) 3 Camp. 326.
(8) (1897) 76 L. T. 234.

1921, the defendant's wife came to the plaintiff, who had already heard something of the circumstances, and told him that her husband had been guilty of adultery and cruelty, and that she wanted to take proceedings against him for divorce. She told the plaintiff that she had been a good wife herself and that there was nothing against her. Upon that the plaintiff seems to have acted with perfect propriety and complete caution. He began to make inquiries about the charge of adultery, and it was soon found that adultery had been committed by the husband. With regard to the charge of cruelty the plaintiff consulted Mrs. Baker's doctor and obtained from him a certificate, which was put in evidence before me, upon which it appeared probable that cruelty would be established. The petition for divorce was presented, but previously the plaintiff had been in communication with the defendant's solicitors with regard to a deed of separation. The plaintiff thought that his client was entitled to something more—namely, a divorce. In the course of various interviews it was intimated by the defendant's solicitors to the plaintiff that the defendant had committed adultery and the plaintiff was told where the adultery had been committed and how it could be proved. But the defendant absolutely denied that he had been guilty of any cruelty towards his wife at all. There was no suggestion made at that time that the wife had been guilty of adultery, nor did the husband then know of it. The petition was presented as an ordinary petition for divorce on the part of an innocent wife. After the petition had proceeded for some time the husband discovered, by means which it is not necessary to go into, that his wife had also committed adultery. The extent of that adultery does not appear before me ; it is not proved that the wife went away and lived with a paramour or anything of that kind, but in fact she had committed adultery. Upon that fact becoming known the petition as framed was bound to fail. She still might get relief if she could satisfy the Court that it was a proper case for the exercise of the discretion of the Court in her favour, but the petition required to be amended in order to ask the Court to exercise its discretion.

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That, however, was not done. The proceedings were dropped and a deed of separation was entered into.

Now if the case against the husband, based upon his adultery and cruelty, depends upon my deciding hypothetically what would have been the result of those issues—the adultery is not in dispute—I should find that the charge of cruelty would have been established so far as I can see at present. If it is a question as to whether there was reasonable ground for the plaintiff thinking that the charge of cruelty would be made out I think it is established that he had a reasonable ground for so thinking. If that was all that was necessary the plaintiff would be entitled to succeed in this action.

But now arises this complication, that the wife, quite unknown to the plaintiff, had herself been guilty of adultery. The plaintiff never inquired into her conduct. I do not know how he very well could. There was nothing to arouse his suspicions as to her character. In those circumstances what is the effect of the wife being herself guilty of adultery? It is clear that the petition, as framed, was bound to fail, and it is not clear whether the discretion of the Court would have been exercised in her favour if the petition had subsequently been amended and she had asked the Court to exercise its discretion in her favour. I am unable to express any opinion at all upon that probability, because I have no materials to work upon. The plaintiff said in evidence that he thought the defendant's wife had a good case with regard to that, but that is all the evidence I have on the point. I have no materials upon which to form my own judgment at all. It seems to me that the wife, who at the material time was residing with her husband, and continued so to reside until after she consulted the plaintiff, when she left, is not ipso facto outside the category of a wife who has presumptive authority to pledge her husband's credit at all. But if the question of the plaintiff's right to recover from the husband depends upon the fact as to whether the proceedings would have succeeded, of course plainly they would not have succeeded having regard to the shape they took, and therefore, if that is the position, the defendant is right. Further than that, in my judgment

if the plaintiff's right to recover from the husband depends upon the plaintiff having a reasonable ground for supposing that the proceedings would succeed, that can only extend to the plaintiff having reasonable grounds for believing what the defendant's conduct had been. It seems to me to be quite unreasonable to hold that the plaintiff can come and say that notwithstanding his own client, the defendant's wife, had not disclosed to him facts which barred her suit, nevertheless he was entitled to recover against the husband, inasmuch as he had no reason to suppose that there were those facts. Of course when a wife is bringing an action against her husband, her solicitor must rely, so far as the husband's acts are concerned, upon what he can prove ex relatione the wife. But when it comes to what affects the wife herself, it is a matter of certainty with her. It is for her protection that this rule exists, and it seems to me that the solicitor must take the risk of the wife misinforming him upon points affecting her own conduct. So far I am in favour of the defendant in this case.

It only remains to consider what is the legal effect of the communications which were made by the defendant's solicitors to the present plaintiff. Of course if the solicitors had come on behalf of the defendant and held him out as being a person who was not going to defend the suit, I think it would be quite clear that the plaintiff would be entitled to recover, because whether you put it upon a representation that the case was one in which the defendant would have to pay the costs and that the petitioner could proceed, or whether you put it upon an implied promise that he would pay the costs, in either case, if that was the position, I think the plaintiff would recover the costs. But I do not think the facts come up to that. The defendant was not saying that the petitioner could proceed upon the basis that it was an undefended action. What he was saying was that he would defend the action strenuously, as he was not guilty of cruelty. He however admitted the charge of adultery, and did not want his wife to have the expense of proving that fact, because if he was beaten in the end he would have to

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pay these costs. But inasmuch as an admission is not enough in a divorce case the defendant offered evidence of adultery so that his wife need not trouble to prove it independently. That is all it means. Therefore it seems to me that the case was a defended one upon the issues other than that of adultery, and that therefore those communications make no difference in the result.

I have not alluded at all to any questions which might arise as to the wife's financial position as known to the plaintiff, upon which an argument was put forward that he should have looked solely to her for the costs for conducting her case. That point does not arise in the view I have taken of the rest of the case. All I say is that the action fails, and must be dismissed with costs. But I wish to add that not a word is to be said against the plaintiff, who has been unfortunate in the matter. His conduct of the proceedings has been admirable, and it is a misfortune for him that he cannot recover his costs from the defendant. The result is that the action is dismissed with costs.

Judgment for defendant.

R. F. S.

The plaintiff appealed.

Sir Henry Maddocks K.C., *Acton Pile* and *Reginald Hendry White* for the appellant.

F. Hinde, *A. C. D. Jackson* and *Percy Lamb* for the respondent.

The arguments were substantially those used in the Court below.

BANKES L.J. This is an appeal from a judgment of Rowlatt J., and raises a point which does not seem, so far as the researches of counsel go, to have been directly raised in any decided case. A wife who at the time was leading a life of adultery instructed a solicitor to present a petition for divorce against her husband on the ground of his adultery and cruelty; the solicitor did not know that she was not an innocent wife. The divorce proceedings went on up to a

point at which, owing to a communication made to the husband, it became known that the petitioner was not an innocent wife. It was then decided not to proceed, and the husband got the petition dismissed for want of prosecution. The wife's solicitor made no application for security or for costs, and the petition was dismissed without any order for costs. The solicitor then began this action, and the husband's defence is that his wife was not his agent of necessity to incur these costs. Rowlatt J. held, and I think rightly, that the husband's defence was made out.

We have been referred to the judgment of McCardie J. in *Michael Abrahams, Sons & Co.* v. *Buckley*. (1) All I desire to say about that case is that the point there was quite different. All that it decided was that the solicitor for an innocent wife, in proceedings which terminated without going into Court, was entitled to recover his costs in a common law action against the husband. The only question under discussion was the right of a solicitor who had a reasonable belief that his client was entitled to a decree. If the matter rested on the solicitor's common law right there could be no question of the correctness of Rowlatt J.'s decision. It has been held that the position of a solicitor is not different from that of a tradesman. In *Brown* v. *Ackroyd* (2), where the action was by a solicitor against the husband in the consistory Court of York for a divorce a mensa et toro, Crompton J. said: "As the case is here put, the plaintiff was bound to shew a probability of such personal violence as rendered necessary the protection of a divorce: he is in a position corresponding to that of a tradesman suing the husband for goods furnished to the wife." Again, in *Russell* v. *Russell* (3), Lindley L.J. points out that: "The wife's solicitor has no right to an order giving him costs as against the husband; her solicitor has no independent right of his own against the husband; the solicitor, in point of law, claims through the wife; and if the Court will not give her any costs against her husband, her solicitor can get none."

(1) [1924] 1 K. B. 903. (2) 5 E. & B. 819, 829.
(3) [1892] P. 152, 157.

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Here the action is a common law action in which the solicitor seeks to recover against the husband on the ground that the wife was an agent of necessity. The answer is that a guilty wife has no authority to pledge her husband's credit for anything, whether food, clothes or the service of a solicitor: *Atkyns* v. *Pearce*. (1) Sir Alexander Cockburn C.J. said in that case, in which a medical man sought to recover from a husband his fees for attendance on a guilty wife: "The fact of her living in a state of adultery divests her of all the authority which arises out of the marital relation." It seems to me that that is a complete answer to a solicitor who seeks to make the husband liable in a common law action.

It is really unnecessary to say more in support of the learned judge's judgment, but we have listened to an interesting argument on the divorce practice. This is a common law action and it must rest on common law principles. But in the Divorce Court one finds a doctrine based on the old idea that on marriage the husband becomes possessed of all the wife's property, and that if she requires support he must provide it. Hence where the wife was called upon to defend herself the Court regarded the costs of her defence as a necessary. Originally, the proctor drew the means of litigation almost from day to day. He carried in his costs of the day and had them taxed and paid. That must have been done on the assumption that the proceedings were properly taken. Then came the stage when costs were no longer taxed as accruing from day to day, but at the end of every term. Under these circumstances the husband was ordered to give security for the wife's costs, and the solicitor was considered entitled to his costs up to the amount of the security on the ground that he had been induced to act for the wife in reliance on that security.

But the Divorce Court had a discretion as to the costs, and when a solicitor in a common law action seeks to support his claim by reference to the Divorce Court practice, he surely

(1) (1857) 2 C. B. (N. S.) 763, 767.

stands in a hopeless position when it appears that the case is one in which the Divorce Court would probably have refused to make any order for the payment of the wife's costs.

SCRUTTON L.J. I have listened attentively to the arguments, and I think the case should be decided on a very short point. The action is brought by a wife's solicitor against her husband, on the common law ground that the wife was an agent to pledge her husband's credit for necessaries. It is not brought on any order of the Divorce Court, and the authorities on the practice of the Divorce Court have nothing to do with this case. It is based on the ordinary common law principle under which a wife living apart from her husband in certain circumstances can bind him by orders for necessaries, and the one fact which disposes of the claim is that the wife was guilty of adultery.

I take the law from Sir James Shaw Willes in *Cooper* v. *Lloyd* (1) where he says: "My brother Williams told the jury, that, if the wife had been guilty of adultery, and there had been no subsequent condonation, the husband would not be liable upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery. That seems to have been the substance of the direction; and it appears to me that it is perfectly good law." And again on the next page (2): "It would be a gross abuse and perversion of justice, when the law lays down that which is a substantial and honest position, that the implied authority of the wife to bind her husband by her contracts is put an end to by her adultery, for us upon slight circumstances pointing equally to one conclusion as to the other, to hold that the jury have come to a wrong one. It appears to me that this disposes of the plaintiff's first proposition: there was proof of adultery, and no

(1) (1859) 6 C. B. (N. S.) 519, 524. (2) 6 C. B. (N. S.) 519, 525.

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condonation. For this there is abundant authority: see, amongst others, the cases of *Govier* v. *Hancock* (1), and *Rex* v. *Flintan* (2) and the expressions of the judges in *Atkyns* v. *Pearce* (3)." In the case above referred to the plaintiff was an ordinary tradesman who supplied goods without the slightest knowledge that the wife was living in adultery: so in *Atkyns* v. *Pearce* (3) the action was by a doctor for medical attendance. In each case it was held that the common law right was disposed of by the breach of the obligation of chastity.

There may be—and in the authorities there is some ground for thinking that there may be—an exception where the wife is defending herself against proceedings brought by the husband. But I can find no such exception where the wife is the attacking party, and I am not going to make it; I think it would be a great pity so to do.

It is unnecessary to say anything about the judgment of McCardie J. in *Michael Abrahams, Sons & Co.* v. *Buckley* (4), for that is a case of an innocent wife, and irrelevant to this case. I agree that this appeal must be dismissed.

ATKIN L.J. This is an action by a solicitor against a husband on the ground that the husband has contracted to pay him the costs incurred in presenting a divorce petition on behalf of the wife. The contract depends on whether the wife had authority to pledge her husband's credit. The solicitor in such a case has no independent right. As Wright J. said in *Cale* v. *James* (5): "It cannot be denied that the solicitor's rights are derivative." I prefer to say nothing as to whether the actual decision in that case was right.

Even if the expenses which the wife here incurred were necessaries, she would have lost her right to pledge her husband's credit if she had been guilty of adultery. That the wife in the present case had been guilty there can be

(1) (1796) 6 T. R. 603.
(2) (1830) 1 B. & Ad. 227.
(3) 2 C. B. (N. S.) 763.
(4) [1924] 1 K. B. 903.
(5) [1897] 1 Q. B. 418, 420.

no doubt, and therefore the solicitor, who must rely on the common law, must fail.

I can see no sort of authority for holding that the common law limitations of the wife's right do not apply to a solicitor as they apply to tradesmen or other professional men. It therefore becomes unnecessary to decide the question raised in the case before McCardie J., whether costs of divorce proceedings are necessaries.

I do not think that it is sufficient for the solicitor to believe reasonably that the proceedings are well founded. Such a rule would enable a wife to devise a plot against her husband, convince a solicitor with a plausible tale that she had good grounds for proceeding against him, and thereby render her husband liable for her costs of presenting a fraudulent petition. Proceedings reasonably instituted must mean reasonably instituted in view of the knowledge possessed by the wife, not in view of that possessed by her solicitor.

Nothing we have said has any bearing on the rules of law and practice as to costs in the Divorce Division. The practice of that division depends on the discretion of the Court, and it may be that the judge, in the exercise of that discretion, will give costs in relief of a wife who has been guilty of adultery. That has nothing to do with the common law rule as to a wife's agency of necessity.

I should like to reserve the point whether the rule is subject to an exception in the case of a guilty wife called upon to defend herself against proceedings brought by the husband. We have had no authority cited to us: it may be that even in that case her solicitor would have to defend in reliance on the Court's exercise of discretion. The point does not strictly arise, and I simply reserve it.

I agree that the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Durnford & Son.*

Solicitors for respondents: *Bentley & Jenkins, for R. Thurlow Baker, Southend-on-Sea.*

J. F. C.

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May 27, 28.

[IN THE COURT OF APPEAL.]

WHITNEY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super Tax—Notice requiring Return of Income to be made—Service by Post Abroad on Non-resident—Validity of Service—Assessment in Default of Return—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72—*Income Tax Act*, 1918 (8 *& 9 Geo.* 5, *c.* 40), *s.* 7, *sub-ss.* 2, 5.

The appellant, a citizen of and resident in the United States, and having possessions in this country from which he derived considerable income, was required by the Special Commissioners for the Income Tax Acts to make a return of his income for the purposes of super tax. Having failed to make the return he was assessed by the Commissioners to the best of their judgment. He appealed against the assessment on the ground that the notice requiring him to make the return had not been validly served upon him. It had been sent to him in America by registered post, and it was contended that the Commissioners had no power to effect service of such a notice out of the jurisdiction :—

Held, that the notice was validly served and the assessment must be confirmed.

Decision of Rowlatt J. affirmed.

Inland Revenue Commissioners v. *Huni* [1923] 2 K. B. 563 followed.

APPEAL from the decision of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, which was in effect as follows :—

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 18, 1923, for the purpose of hearing appeals, Mr. Harry Payne Whitney (hereinafter called "the appellant") appealed against the following assessments to super tax made upon him under the provisions of the Income Tax Acts :—

For the year ending		April 5, 1918,	in the sum of		90,000*l.*
,,	,,	April 5, 1919,	,,	,,	90,000*l.*
,,	,,	April 5, 1920,	,,	,,	90,000*l.*
,,	,,	April 5, 1921,	,,	,,	90,000*l.*

2. The appellant was a citizen of, and was domiciled and resident in the United States of America. Between the month of March, 1914, and April 5, 1921, the appellant had not at any time resided in or visited the United Kingdom.

3. At all material times the appellant and his wife were

the holders of large blocks of shares in a company registered and carrying on business in the United Kingdom, which was duly assessed to income tax under Case 1 of Sch. D in respect of the profits and gains of its trade. In each of the years ending April 5, 1917, April 5, 1918, April 5, 1919, April 5, 1920, and April 5, 1921, the company declared and paid dividends out of those profits and gains and the appellant and his wife were in receipt of such dividends in each of those years. Thus for each of the years preceding the respective years for which the assessments under appeal were made, and for those respective years, the appellant and his wife were in receipt of income from a source in the United Kingdom.

4. On March 10, 1920, notices in the form prescribed by regulations made by the Commissioners of Inland Revenue were sent by registered post to the appellant in New York, requiring him to make a return of his income for the purposes of super tax for each of the years ending respectively April 5, 1918, April 5, 1919, and April 5, 1920. On October 21, 1920, a similar notice was sent by registered post requiring the appellant to make a return of his income for super tax purposes for the year ending April 5, 1921, and at the same time a renewed application was made for the returns for the three preceding years.

5. The appellant did not, however, comply with the said notices or any of them and did not make any return of his income for the purposes of super tax. In the absence of any return the Special Commissioners dealing with the matter made assessments upon the appellant according to the best of their judgment for each of the years ending April 5, 1918, April 5, 1919, April 5, 1920, and April 5, 1921, in respect of income accruing to him and his wife from sources in the United Kingdom, and these assessments formed the subject of the appeal.

Notices of these assessments were in due course sent by registered post to the appellant in New York, and notices of appeal against these assessments were duly given.

It was admitted on behalf of the appellant that all notices

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in this case were addressed to his proper address in New York.

6. It was contended on behalf of the appellant :—

(1.) That the Special Commissioners had no power or jurisdiction to serve out of the United Kingdom upon a non-resident a notice requiring a return of income for the purposes of super tax.

(2.) That the Special Commissioners had no power or jurisdiction to serve out of the United Kingdom upon a non-resident alien a notice requiring a return of income for the purposes of super tax.

(3.) That a non-resident can be lawfully assessed to tax (including super tax) only (if at all) in the name of a trustee, guardian, tutor, curator, committee, factor or agent, and not in his own name.

(4.) That the appellant did not, on the facts before the Commissioners, fail to make a return, and the Commissioners had in the circumstances no jurisdiction to make upon the appellant the assessments appealed against or any of them.

(5.) That a non-resident is not liable to be assessed to or charged with super tax at all.

(6.) That a non-resident alien is not liable to be assessed to or charged with super tax at all, and

(7.) That the assessments were invalid and should be discharged.

7. It was contended on behalf of the Crown that the assessments had been correctly made and should be confirmed.

8. The Commissioners were of opinion that the appellant was liable to be assessed to super tax in his own name on the amount of his income charged to income tax in the preceding year, and that the notices requiring him to make returns for the purposes of super tax having been properly served the assessments were validly made in the absence of returns. There being no dispute as to the amounts they accordingly confirmed the assessments.

The case came before Rowlatt J. on March 3, 1924, and the learned judge held, following his own decision in *Inland*

Revenue Commissioners v. *Huni* (1), that a notice under s. 72, sub-s. 2, of the Finance (1909–10) Act, 1910, requiring the person served to make a return of his income for the purposes of super tax can be validly served by post on a non-resident out of the United Kingdom. He accordingly confirmed the assessments.

Mr. Whitney appealed. The appeal was heard on May 27 and 28, 1924.

Sir John Simon K.C., *Bremner* and *McMullan* for the appellant. Two questions arise on this appeal. The first is whether super tax is payable by a non-resident alien. That point has already been decided by the Court of Appeal adversely to the subject in *Brooke* v. *Inland Revenue Commissioners* (2), and is therefore not open to the appellant in this Court. It is merely mentioned in order that it may be kept open should this case go elsewhere.

The second point is whether a non-resident alien who has not been in this country at all can be treated as bound to make a return to the Commissioners of Inland Revenue, and whether if he fails to do so the Commissioners can treat him as being in default and assess him themselves.

The provisions as to super tax in the Income Tax Act, 1918, are to be found in ss. 4 and 7, sub-s. 6.

The sections of the Income Tax Act, 1842, which show how a non-resident is to be taxed are ss. 41, 46, 47, 48, 51 and 53.

The scheme of the Act in the case of non-resident aliens is that the notices, etc., should be served on persons within the area administered by the Commissioners and not on the non-resident alien direct. The whole scheme of the Act was that he was only to be chargeable through his trustees, factors, or agents in this country.

The above sections of the Act of 1842 are reproduced in the Act of 1918.

In the present case the first two years' assessments are governed by the Act of 1842 and the second two years by the Act of 1918.

(1) [1923] 2 K. B. 563. (2) [1918] 1 K. B. 257.

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By the All Schedules Rules to the Act of 1918, r. 5: "A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of any such trustee, guardian, tutor, curator, or committee, or of any factor, agent, receiver, branch, or manager, whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

Sect. 41 of the Act of 1842, reproduced by s. 76 of the Act of 1918, shows that the machinery for collecting the tax is a local machinery. Sect. 42, reproduced by s. 98, provides that notices shall be addressed to persons resident within the area administered by the Commissioners. Sect. 48, which deals with particular notices, is reproduced by ss. 98 and 99. Sect. 51 is reproduced by s. 103 and s. 53 by s. 101.

The statutes proceed upon a territorial basis. It is submitted that there is nothing in the Acts which justifies the sending of notices across the seas. Sect. 53 of the Act of 1842 is a plain recognition of the fact that a person resident abroad cannot be personally charged. The provisions as to general notices in the Act of 1842 did not contemplate the service of notices through the post. Subsequently it was by statute rendered legal to serve notices by post: Act of 1918, s. 7, sub-s. 2.

Super tax is an additional income tax and persons are to be charged in the same way as for income tax, but the class of persons to be charged is not increased.

By the Finance (No. 2) Act, 1915, s. 36: "Any notice or other document to be given, served, sent, or delivered, under the Income Tax Acts, may be served by post in such cases as the Commissioners of Inland Revenue direct by regulations to be made by them for the purpose." Service by post was merely allowed as a more convenient method of serving persons who could before have been served. The power given to serve by post did not extend the area within which notices could be served.

As regards income tax as apart from super tax it is submitted that there is no power to require persons resident outside the jurisdiction to make returns to income tax.

Super tax is an additional income tax: *Bowles* v. *Attorney-General.* (1) The differences between super tax and income tax are that in the case of the former (1.) the assessment is made on the income from all sources, and (2.) it is made by the Special and not the General Commissioners.

Super tax is imposed by Part IV. of the Finance (1909–10) Act, 1910. Sect. 71, sub-s. 1, provides for exemptions and abatements in the case of persons not resident in the United Kingdom. Sect. 66, sub-s. 2, provides for the mode in which super tax is to be calculated. The really important section for the present purpose is s. 72.

This demand for a return cannot be regarded as a mere notice. That is not the right view of it. A non-resident cannot be personally served with such a notice out of the jurisdiction. There is no provision in the Income Tax Acts allowing such service.

Sir P. Hastings A.-G. and *R. P. Hills* for the Crown. It is said that super tax is merely an additional duty of income tax and must be regarded as in all respects equivalent to income tax; but all the provisions of the Acts with regard to income tax or super tax are not common to them both: *Davis* v. *Inland Revenue Commissioners.* (2)

It has been argued that the proper method of enforcing the liability of a non-resident is through his trustee, factor or agent in this country under s. 41 of the Act of 1842, and that the subsequent sections of that Act show that there should be an appropriate area within which the necessary notices can be given. But s. 41 is an enabling and not a limiting section: *Tischler* v. *Apthorpe* (3); *Werle & Co.* v. *Colquhoun.* (4) *Ex parte Huxley* (5) shows that the powers of the revenue under the generality of the charging sections of the Act are not controlled by the wording of other parts of the Act.

(1) [1912] 1 Ch. 123.
(2) [1923] 1 K. B. 370, 373.
(3) (1885) 2 Tax Cas. 89.
(4) (1888) 20 Q. B. D. 753.
(5) [1916] 1 K. B. 788.

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The point raised on this appeal was decided by Rowlatt J. in favour of the Crown in *Inland Revenue Commissioners* v. *Huni*. (1)

[They were stopped by the Court.]

Bremner in reply. Service by post means by post in the United Kingdom.

1924. May 28. POLLOCK M.R. [after referring to the facts as stated in the case :] That being the position, we must consider the terms of the Income Tax Acts, to see whether, under those circumstances, there is any liability to income tax. Under s. 2, Sch. D, of the Act of 1853 there is a charge, that is to say, income tax is granted : "To Her Majesty for and in respect of the annual profits or gains accruing to a person whether the subject of Her Majesty or not, and although not resident within the United Kingdom from any property whatever in the United Kingdom." As found by the Commissioners, the property subject to the tax consists of the profits and gains of the business carried on by a company registered, and carrying on its business, in the United Kingdom. They were declared in the United Kingdom, dividends were paid out of those profits and gains in the United Kingdom, and the appellant and his wife were therefore in receipt of property in the United Kingdom. Under those circumstances I call attention to Sch. D of the statute of 1853, which imposed prima facie a liability to income tax in respect of those annual profits or gains. The modern form of the statute is to be found in the Schedule to the Act of 1918, which provides : "Tax under this Schedule shall be charged in respect of the annual profits or gains arising or accruing . . . . (iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom. . . . ." It is not contested that there is this liability on the part of the appellant, and his wife, persons who are American by birth, and are resident in New York. The point whether they are aliens or not is not taken, but it is said they are not resident

(1) [1923] 2 K. B. 563.

here; and although they are not resident here, again it is admitted that their property over here comes within the terms of Sch. D, whether in the one Act or the other that I have quoted, so that they would be liable to income tax. That has been decided in *Brooke* v. *Inland Revenue Commissioners* (1), which is binding upon this Court, and the point cannot be raised here. Counsel for the appellant, however, wishes to safeguard his right to raise the point, if opportunity should occur, in a higher tribunal, and he is of course entitled to do so. Assuming, however, that there is this liability to super tax the question arising upon this appeal is whether or not there is any machinery to enforce the liability to super tax, which was established by the decision in *Brooke* v. *Inland Revenue Commissioners.* (1) In that particular case the service was made upon the person charged when she was in England, and notice of the charge was served upon her in England. In the present case the distinction is taken that service was by post addressed to New York, and that, therefore, the conditions which were held sufficient in *Brooke* v. *Inland Revenue Commissioners* (1) do not appear in the present case. The objection to this system of giving notice to the person charged is put in this way. It is said that by the section imposing it super tax is to be deemed to be an additional duty of income tax, and therefore its character, its nature, and the method in which it is to be regarded and treated is the same as that of income tax. I agree that s. 66 of the Finance Act, 1910, does say that what is called super tax is to be imposed, and that it is an additional duty of income tax, but I wish to dissociate myself entirely from the view that super tax is, in all respects, simply the equivalent of a further duty of income tax, and that it is not independent of, or in any way separate from, or distinguishable from, income tax. I think what was said by Lord Sterndale in *Davis* v. *Inland Revenue Commissioners* (2) is of great importance on this point: "I think we have to approach this matter with this fact in mind: that super tax is an additional income tax. In that sense it is not a

(1) [1918] 1 K. B. 257. (2) [1923] 1 K. B. 370, 373.

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separate tax. It has been so held in several cases; indeed it appears perfectly clearly from the statute which imposes super tax. But if it be sought to deduce from that this proposition, that therefore all provisions with regard to income tax or super tax are to be considered as common to them both, there is no foundation for such a deduction." I desire to associate myself with that view. However the present argument is put in this way. It is said, at any rate, super tax is sufficiently akin to income tax to justify a consideration of the system provided for the collection of income tax, and in construing the regulations which have been made, for enabling the Commissioners to send notices by post, regard must be had to the purposes, and the limits of the purposes, for which they were to be used, and they cannot be treated as at large, and independent of the qualifications and limitations which ought to be imposed in their construction, in view of the sections of the Income Tax Acts which circumscribed the powers of collectors of income tax when those sections were first enacted. Our attention was called particularly to s. 41 of the Income Tax Act of 1842. It is said that by that section in the case of a non-resident provision is made whereby persons can be made liable in the name of a factor, an agent, or a receiver, and that is the appropriate method of rendering a non-resident liable. If you will then follow out from s. 41 the scheme of the Act as illustrated by, or enacted in ss. 46, 47, 48, 51 and 53, you will see that the intention is that there shall be an appropriate area within which notices can be given. There are notices to be given to persons who are within that appropriate area. You will find a number of other details, all pointing to something like the delimitation of the powers and the area within which the powers are to be exercised imposed by these sections, and thus, when you come to consider what the regulations are, you must treat those regulations, and construe them, as being appropriate to those limited powers, and not further, or otherwise.

I think the answer to that is that s. 41 of the Act of 1842, and the subsequent chain of sections, are not to be treated

as imposing limitations upon the wide terms of Sch. D. If authority is needed for that, it is to be found in *Tischler* v. *Apthorpe* (1), where Mathew and A. L. Smith JJ. point out that s. 41 is not intended to be a limiting section, it is an enabling section, giving powers to the Commissioners, if they are unable to get at the principal, to secure the liability of the principal through the agent: "Where the case arises, contemplated by s. 41," says Mathew J., "one resident abroad who cannot be reached by the Commissioners, then the Commissioners are entitled to fall back upon the valuable and useful provisions contained in the section," and A. L. Smith J. says: "I am clearly of opinion that s. 41 was not passed in derogation of the rights of the revenue, but was passed to aid them." Later, when *Werle & Co.* v. *Colquhoun* (2) came before Lord Esher M.R., he said that he agreed with the judgment in *Tischler* v. *Apthorpe* (1): "I do not think that the right to assess is limited by s. 41, which is only machinery."

It seems quite clear that any interpretation put upon s. 41 which would in any way embarrass or circumscribe the rights of the revenue would be wrong. Wider words really could not be used than those used by A. L. Smith J., that s. 41 was not passed in derogation of the rights of the revenue, and the rights of the revenue are the very wide powers which are contained in Sch. D.

That view of s. 41, expressed and upheld in the Court of Appeal as it was in 1888, was considered by Atkin J. in *Brooke* v. *Inland Revenue Commissioners.* (3) He says: "These cases"—that is *Tischler* v. *Apthorpe* (1) and *Werle & Co.* v. *Colquhoun*—"appear to show conclusively that in the case of a non-resident the Commissioners are not restricted to the means provided by s. 41"; in other words, it seems quite clear that you have to look at Sch. D, and the section imposing it, which confers the wide powers, and the wide liability, as still existing, and not in any way cut down by subsequent sections, which

(1) 2 Tax Cas. 89, 93, 94. (2) 20 Q. B. D. 753, 760.
(3) [1917] 1 K. B. 61, 70.

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may be utilized in particular cases, but which are only to be utilized in the cases where they are of service to the revenue.

If an illustration, again, is wanted of the wide powers of the revenue still left untouched by subsequent sections it is to be found in *Ex parte Huxley*. (1) In that case an infant who had no trustee or guardian having the direction, or management, or control of his property within s. 41 of the Income Tax Act, 1842, was held assessable to income tax in respect of his personal earnings. The Master of the Rolls, Lord Cozens-Hardy, says that although the jockey in question was an infant, and although he had no guardian who could be charged, he was yet chargeable, because the Act of 1842 makes all persons receiving profits chargeable to income tax under Sch. D, and the infant was a person receiving profits, and there was no section which cut down his liability. It seems, therefore, to me that the argument presented upon s. 41, and the subsequent chain of sections, breaks down in the case not only of income tax, but of super tax.

But when I come to the question of super tax I think the matter becomes even more plain, because super tax is originally imposed by s. 66 of the Finance Act of 1910, and the powers for the purpose of collecting it are contained in s. 72 of that Act: "Super tax shall be assessed and charged by the Commissioners for the special purposes of the Acts relating to income tax." Every one who has been concerned in income tax cases knows that there are both General Commissioners and Special Commissioners, and the assessment and charging of super tax is entrusted to the Special Commissioners, whose jurisdiction is not limited to particular areas, but embraces the whole of the country, and certainly the whole of the area in which those profits accrued to, and became payable to, the appellant and his wife in the United Kingdom, and s. 72 provides, under sub-s. 8: "The Commissioners may make regulations for the purpose of carrying this section into effect." No wider powers as to regulations, it seems to me, could be used. They have

(1) [1916] 1 K. B. 788.

made regulations; they have made regulations which it is not said are ultra vires, but it is said that the construction of the regulations must be such as to limit them. It seems to me that the powers of the Commissioners are intended to be wide—wide as in the cases which I have quoted. The powers of collecting income tax are wide, and intended to effect and carry out the imposition of income tax upon all property which is in this country, and whether it belongs to a resident or a non-resident. In the present case, under the regulations, the Commissioners have secured that a notice should be sent to Mr. Whitney. He agrees that he received the notice. The only question, therefore, that can be raised is: Was there any power to send him that notice?

It is said that these words, "The Commissioners may make regulations for the purpose of carrying this section into effect," must, in some way, be cut down in respect of the regulations, and that it is improper to have made use of the post which is indicated by the regulations for the purpose of reaching a non-resident. It is always important to bear in mind that although the owner of the property is, no doubt, concerned, as the person who will have ultimately to pay the tax, still, the charge that is made by Sch. D is imposed upon the annual profits or gains, or in respect of the annual profits or gains, accruing to any person from any property whatever in the United Kingdom. It is the fact that there is property here that induces the liability to the income tax.

It appears to me that this very point which has been taken has, in effect, been decided by Rowlatt J. in *Inland Revenue Commissioners* v. *Huni*. (1) He says: "The question is whether in this case the machinery has failed the revenue. There is a provision which is applicable to super tax which enables the revenue authorities to assess a person who is abroad in the name of his agent. I do not think that provision throws much light upon this question, because it has been held several times that that provision is in augmentation of the powers of the revenue and not in limitation of them. If the person chargeable can be served the necessary steps

(1) [1923] 2 K. B. 563, 570.

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can be taken against him personally without troubling about an agent, even though he has an agent, and if he has no agent that is the only way it can be done." Rowlatt J., whose experience in these cases is very wide, had, no doubt, in his mind *Tischler* v. *Apthorpe* (1) and the subsequent case of *Werle & Co.* v. *Colquhoun* (2), and he stated the proposition which he did from his experience, and felt it was so well founded upon authority that he did not actually require to cite the authorities. But he did come to the conclusion in that case that the machinery had not failed the revenue. I have come to the same conclusion. I think it is impossible to circumscribe, in the matter of super tax or of income tax, but I am dealing only with super tax, the powers and sphere of the regulations that have been made, and inasmuch as there is a duty on the Commissioners to try and collect the revenue which arises from property in this country, they had, therefore, power to issue this notice by post. That has been done, response to it has not been made, the duty which falls upon the owner of property in this country has not been fulfilled, and therefore the Commissioners were in a position to proceed to make an assessment themselves.

For these reasons I think that the assessment was rightly made, that the decision of the Commissioners was right, and that therefore the appeal ought to be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The question raised on this appeal is whether certain assessments to super tax made by the Special Commissioners under s. 7, sub-s. 5, of the Income Tax Act, 1918, are valid. It is said they are not, because the condition precedent to their having power to make the assessment themselves is the failure of the person concerned to make a return required by the section. There is no question here that the person concerned did not make the return, but it is said that notice requiring him to make it was not properly served upon him. That is the only question we have to determine.

The taxpayer is an American subject. He is resident

(1) 2 Tax Cas. 89. (2) 20 Q. B. D. 753.

in America, and has no residence here. He and his wife have large possessions in this country from which he, and she, derive a very considerable income. It is admitted that it must, in this Court, be held, on the authority of *Brooke* v. *Inland Revenue Commissioners* (1), that he is liable to super tax in respect of the income of the property I have just mentioned. It is settled that, notwithstanding the provisions contained in s. 41 of the Act of 1842, and the corresponding provisions in the Act of 1918, the Commissioners are entitled to charge the man himself as a taxpayer, and are not driven to the necessity of serving notices upon, and making the assessment in the name of, an agent in this country. Mr. Whitney, therefore, is, in every respect, properly treated as the person liable to pay tax.

Then the next question which arises is: Have the Commissioners taken the proper proceedings for the purpose of enforcing that liability? That question turns entirely upon the provisions of s. 72 of the Act which created super tax, that is, the Finance Act, 1910, and the corresponding section of the Act of 1918, that is to say, s. 7. It is quite unnecessary to read more than one of those two, because they exactly correspond. Sect. 7—there are very few parts which are material for the present purposes—provides: "Super tax shall be assessed and charged by the Special Commissioners." Then the second sub-section is: "Every person upon whom notice is served, in manner prescribed by regulations under this section, by the Special Commissioners, requiring him to make a return of his total income from all sources . . . . shall make such a return in the form and within the time required by the notice," and if he fail to make a return under this section, or if the Special Commissioners are not satisfied with the return, they may make an assessment to super tax according to the best of their judgment. Then sub-s. 8 provides: "The Commissioners of Inland Revenue may make regulations for the purpose of carrying this section into effect." As I have already shown, it is settled that

(1) [1918] 1 K. B. 257.

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Mr. Whitney is a person from whom the Commissioners may require a return, they do require a return, and under the regulations which were duly made under the sub-section they have to serve notice upon him. Those same regulations provide that any notice required to be served on any person under these regulations may be either delivered to such person, or left at his last-known place of abode, or sent by post by prepaid registered letter addressed to such person at his last-known place of abode, and such service shall be service deemed sufficient for the purpose of these regulations.

Now, it is pointed out that the notice in question asserts no jurisdiction over the man; all that it does is to tell him he is required to do a certain act, and that if he fails to do that act somebody else will take a certain step. That is all that it does. With a notice of that sort, one looks to see whether any restriction is imposed by the legislative authority which gives power to serve the notice as to the place where it shall be served. The only restriction alternative to personal delivery to the man himself is that it is to be left at his last-known, or usual place of abode, or sent there by post by registered letter prepaid. There is no local restriction except that if it were left otherwise than in his own personal possession it must be left at his last known place of abode, or sent there by post by registered letter. The Commissioners in this case sent the notice by post. That seems to me to be sufficient service, and being sufficient service, it is not disputed that the assessment which was made by the Commissioners in default of his complying with that notice was an effectual assessment.

In my opinion, therefore, the appeal must be dismissed, and the assessment must stand.

SARGANT L.J. I am of the same opinion. After an argument which has travelled over a good deal of ground, the only question that this Court has to decide in this case is whether a proper notice has been given to the appellant. It is admitted that in this Court he must be held liable,

and chargeable, under Sch. D of the 1853 Act, to super tax—that is to say, by the analogy by which super tax was imposed on persons in respect of property which was liable to income tax. The question is whether, he being abroad, the Commissioners were competent to serve a notice upon him which would originate the consequences which fall on any one who does not make a return.

The material section is s. 7 of the Act of 1918, which is the only section to which I will refer, because although the two years of the assessment refer to an earlier date, and are governed by the Act of 1910, the language of that Act is precisely the same as the language of the 1918 Act for these purposes. Sect. 7 speaks of every person upon whom notice is served, and sub-s. 5 speaks of any one who fails to make a return, and then certain consequences follow. It is, therefore, I think, essential that there should be some service on the individual. The argument of the appellant is that a service on the individual in this case must be a service within the jurisdiction, that there is nothing which gives the Commissioners any power whatever to effect a service of such a notice out of the jurisdiction. Whether it was sent by post or not is immaterial. For it is said that there was no power to send a messenger with an individual notice or to in any other way give a notice which operated outside the territorial jurisdiction. It seems to me that that is applying wrongly the sort of analogy which is derived from the service of writs, documents which seek to enforce a personal liability against an individual by means of the jurisdiction of the Courts. In my judgment the notice in such a case as this is much more like the notices which have to be given with regard to individual contracts, such as notices to terminate a lease, or to exercise an option; or, at any rate, to be of the class of notices which are referred to in Order XI., r. 8 (*a*), of the Rules of the Supreme Court, which, after providing for service of certain originating summonses, and other processes, adds this: "Nothing herein contained shall in any way prejudice or affect any practice or power of the Court under which when lands, funds, choses in action, rights or property

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within the jurisdiction are sought to be dealt with or affected, the Court may, without affecting to exercise jurisdiction over any person out of the jurisdiction cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming, opposing, or otherwise intervening." It seems to me that in the case of such a notice as that which is provided for in s. 8 of the Income Tax Act of 1918 there is no prima facie implication that the area within which that notice may be served is the area of territorial jurisdiction, such as is prescribed, or is necessary, in the case of a writ. It is for the appellant rather than for the Crown to show some limitation of this general power of service which, prima facie, is operative wherever the person to be served can be found. Now it is not questioned that the appellant was in fact found and that service was effected, in fact, upon him according to the regulations, and there having been service, it appears to me that all the consequences follow which are sought to be enforced in the case—namely, that the Commissioners had power themselves to make an estimate, and make an assessment in accordance with that estimate.

I will only add this, that great reliance has been placed upon what was said by Mathew and A. L. Smith JJ., particularly on what the former said in *Tischler* v. *Apthorpe* (1) in this passage at the conclusion of the judgment. He is referring to the old Act: "If the principal can be got at there is no need to have recourse to s. 41, or to have recourse to s. 44. Here the case arises contemplated by s. 41 of a resident abroad who cannot be reached by the Commissioners." Those two passages, or phrases, "can be got at," and "cannot be reached by the Commissioners," were dealt with by the appellant as if they meant cannot be legally got at because he is outside the jurisdiction. I do not think that was what the learned judge referred to. I think that what he was speaking of was the physical difficulty of finding non-residents and getting at them. If that is so, there is no

(1) 2 Tax Cas. 89, 93.

inference adverse to the Crown to be drawn from the passage in question, or from the corresponding passage in the judgment of A. L. Smith J.

Appeal dismissed.

Solicitors for the appellant: *Clarke, Rawlins & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

G. A. S.

[IN THE COURT OF APPEAL.]

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BRIGHTMAN AND COMPANY *v.* BUNGE Y BORN LIMITADA SOCIEDAD.

Ship—Charterparty—Contract to load One of several alternative Cargoes—Exercise of Option by Shipper—Effect of—Prohibition of export of selected Cargo—Right of Shipper to reasonable Time to arrange for alternative Cargo—Exceptions—Obstruction preventing Loading.

Where a shipper contracts to load one or other of several alternative cargoes the fact of his making up his mind which he will load and arranging for its loading does not constitute an election which binds him to load that particular cargo to the exclusion of the others; and the fact of his being subsequently prevented by causes outside his control from loading that particular cargo will not excuse his neglect to perform his contract by loading one of the other alternative cargoes.

A charterparty provided that the charterers should load a "cargo of wheat and/or maize and/or rye" at a certain specified rate, and that "If the cargo cannot be loaded . . . . by reason of obstruction . . . . beyond the control of the charterers on the railways . . . . the time for loading . . . . shall not count during the continuance of such causes." The loading was not completed within the lay days. The charterers had resolved to load a cargo of wheat. They had not got the wheat ready at the port on the arrival of the ship, but had arranged to have it sent down from the interior by the C. railway. Owing to a concerted scheme on the part of the servants of that railway company, whereby, while adhering strictly to the rules of the company, they delayed the working of the traffic, the wheat did not come forward sufficiently fast to enable the charterers to load at the contract rate. There were other railways by which the wheat might have come down to the port, and upon those railways the above mentioned dilatory scheme had not been adopted. According to the practice of the port wheat coming there for shipment was sometimes loaded directly from railway trucks, and sometimes from warehouses, of which there was an ample supply in the port. After the loading

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by the charterers had begun the export of wheat from the port was prohibited by the authorities. In an action for demurrage:—

Held (1.), that the charterers were not protected by the exception clause:—

By Bankes L.J. on the ground that the dilatory scheme of the railway company's servants did not on the facts amount to an obstruction.

By Scrutton and Atkin L.JJ. on the ground that, though it amounted to an obstruction, prima facie the exception was limited to an obstruction which prevented the cargo from being loaded, as distinguished from one which prevented it from coming forward, and here the dilatory scheme did not prevent the cargo from being loaded, for the wheat might have been brought down by one of the other railways, or might have been stored ready in the warehouses and so have been independent of the railways altogether; and further the obstruction was not an "obstruction on the railways," for the exception must be read as referring to the railways in the port itself directly connected with the process of loading.

(2.) That, although upon the prohibition against the export of wheat coming into force the charterers became under an obligation to load maize or rye, they were not bound to load it immediately, but were entitled to a reasonable time to see whether the prohibition would be removed and to make arrangements for loading the substituted cargo, and to the extent of that reasonable time they were excused from paying demurrage.

Judgment of Bailhache J. reversed.

APPEAL from the judgment of Bailhache J. on appeal from the award of an umpire.

By a charterparty dated April 14, 1920, made between Brightman & Co., owners, and Bunge y Born Limitada Sociedad of Buenos Aires, charterers, it was agreed that the charterers should load at Rosario on the steamship *Castlemoor* "a full and complete cargo of wheat and/or maize and/or rye" for carriage from Rosario to the Continent, the charterers having the option of shipping certain other specified kinds of lawful merchandise. The steamer was to be loaded at a certain specified rate, otherwise demurrage to be paid by the charterers at the rate of 250*l.* per running day. By cl. 30 it was provided that: "If the cargo cannot be loaded by reason of riots, civil commotions, or a strike or lockout of any class of workmen essential to the loading of the cargo or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places, ... the time for loading

. . . . shall not count during the continuance of such causes." The loading of the *Castlemoor* began at midnight on May 19, and if there were no exceptions it should have been completed on June 4 at 4 P.M. In fact it was not completed till June 15 at 11 A.M.—that is, ten days nineteen hours after the expiry of the lay time. The owners claimed demurrage for that period. It appeared that on May 15, 1920, there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a " go slow " or " ca canny " movement, and lasted till June 6. It was a concerted scheme on the part of the employees of the company, designed to force the company to withdraw certain regulations which the Government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but, by means of an extravagantly strict adherence to the various rules of the company in regard to the working of traffic and the performance of their ordinary duties, so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving the company any specific ground for dismissal. Wheat is loaded at Rosario from warehouses and also from railway trucks. The grain is brought down to the port from the interior by the Central Argentine and four other railways. On arrival of the loaded trucks at the boundary where the port railway begins they are taken over by the port company and thereafter worked by that company's locomotives. The grain storage accommodation in the port is very considerable. On the arrival of the *Castlemoor* the charterers, who had made up their mind to load wheat, had not got their cargo ready in the port and had to depend upon the arrivals of grain coming down by railway. They were loading the *Castlemoor* from trucks, their wheat being brought down by the Central Argentine, that being the only railway which was affected by the " ca canny " policy. On June 4 the Argentine Government issued a prohibition against the export of wheat, which prohibition lasted down to June 11. By reason of that prohibition the loading of wheat into the *Castlemoor* was

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stopped between those dates. On June 10 the charterers commenced to load maize instead of wheat. They claimed that they were excused from paying demurrage at all by reason of the "ca canny" movement on the Central Argentine Railway, on the ground that it amounted to an "obstruction on the railways" within the meaning of the exception clause; and further that they were excused by the wheat prohibition during the period that it operated. The umpire held that the "ca canny" movement was an "obstruction" on the railway, and found that it caused a delay of six days, but that it caused delay only in bringing cargo to the port, and in no way affected the actual process of loading, and he accordingly refused to make the charterers any allowance under that head.

With regard to the prohibition against export he held that as the charterers had made all their arrangements for loading wheat and not maize, before they were required to complete the cargo with maize they were entitled upon the issue of the prohibition to wait a reasonable time to see whether it would be removed, and he found that such a reasonable time had not expired on June 10 when they began to load maize. On that head he allowed the charterers six days, and awarded to the owners the balance of the demurrage claimed—namely, four days nineteen hours. On appeal from that award Bailhache J., following a decision of Rowlatt J. in *Owners of S.S. Ardgowan, &c.* v. *Royal Commission on Wheat Supplies* (1), held that on the prohibition coming into force the charterers were under an immediate obligation to load one of the alternative cargoes forthwith, and set aside the allowance of six days that had been made by the umpire. He accordingly gave judgment for the full amount of the demurrage claimed.

The charterers appealed.

R. A. Wright K.C., *Jowitt K.C.* and *Van Breda* for the appellants. The "ca canny" movement was an "obstruction on the railways" within the meaning of cl. 30. A partial

(1) (1923) 15 Ll. L. Rep. 81.

withdrawal of labour may amount to an obstruction. Whether it does so is a question of fact. The umpire has found that it did, and with that finding of fact the Court will not interfere. The railways referred to include the railways from the interior. For none of the railways, not even the port railways, can have any direct connection with the operation of putting the cargo on board, and therefore there is no reason for limiting the word "railways" to the railways in the port. Then if the movement was an obstruction on the railways it was one which prevented the cargo from being loaded at the contract rate. It is immaterial for that purpose that there were other railways available. The shippers had made their arrangements for bringing down the wheat by the Central Argentine, and as a matter of business they could not be expected to change them. Secondly, they are entitled to an allowance of time in respect of the period covered by the prohibition—that is, from June 4 to June 10. That the contract was to load one of several alternative cargoes, and that they might have loaded maize upon the prohibition being issued is no answer. As soon as they decided to ship wheat and made their arrangements with the railway company for doing so, whether they informed the shipowners of that fact or not, their decision amounted to an election, which converted the contract into a contract to ship wheat only to the exclusion of the alternative cargoes. Therefore, upon the export of wheat being prohibited they were relieved from any further obligation to load any cargo at all; there was no obligation to ship maize. But even if they were under such an obligation they were entitled, as held by the umpire, to a reasonable time within which to alter their arrangements, and that reasonable time he has fixed at the same period—namely, six days.

Mackinnon K.C., *Miller K.C.* and *Le Quesne* for the respondents. The prohibition of export of wheat did not afford the charterers any excuse for the delay, for the contract was not confined to wheat, it was to load one of several alternative cargoes; and the mere fact that the charterers made up their minds to load a particular one of those alternatives did not convert it into a contract to load that

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particular cargo, so that their obligations were thenceforward confined to that particular cargo. Having promised to perform a contract in one or other of several ways they must, in order to be excused, show that they were prevented from performance in any way. They cannot turn an alternative contract into a specific one without the consent of the other party. Here there was nothing to prevent them from loading maize, and they were bound to load that substituted cargo at once without any delay. In the case of an alternative contract the charterers are bound to have all the alternative cargoes ready. Nor did they bring themselves within the exceptions of cl. 30. Prima facie the charterer is bound to have the cargo ready at the port on the arrival of the ship. The exceptions may be so worded as to show that it is intended to excuse delay in bringing the goods to the place of shipment as well as in the actual shipment itself: *Furness* v. *Forwood* (1); *Hudson* v. *Ede*. (2) But he must show clearly that that was intended. For the presumption is that an exception of the prevention of loading by causes outside the charterer's control is meant to apply only to causes preventing the actual process of loading a cargo that is already in the port, and not to extend to causes preventing the cargo from being brought there from a distance: *Grant & Co.* v. *Coverdale & Co.* (3); *Ardan S.S. Co.* v. *Weir & Co.* (4); *The Rookwood* (5); *Stephens* v. *Harris & Co.* (6) There is nothing in the facts of the case to displace that presumption. On the contrary, it is supported by the association in the exception itself of the obstruction on the railways with the process of loading—"cannot be loaded .... by reason of obstruction .... on the railways," suggesting that the railways there referred to are the railways in the port, from the trucks on which the grain is shot directly into the hold. But even if the exception was intended to apply to the railways coming from the interior, the obstructive movement on the Central Argentine Railway did not necessarily cause the loading on

(1) (1897) 2 Com. Cas. 223.
(2) (1868) L. R. 3 Q. B. 412.
(3) (1884) 9 App. Cas. 470.
(4) [1905] A. C. 501.
(5) (1894) 10 Times L. R. 314.
(6) (1888) 57 L. J. (Q. B.) 203.

the *Castlemoor* to be delayed, for the wheat might have been brought down by one of the four other railways on which no "ca canny" movement existed, and further the charterers instead of depending on the railways to bring the wheat down after the *Castlemoor* had arrived, might have had it stored ready in the warehouses in the port.

R. A. Wright K.C. was heard in reply.

Cur. adv. vult.

July 31. The following written judgments were delivered :—

BANKES L.J. The appellants are the charterers and the respondents are the owners of the steamship *Castlemoor*, which the appellants chartered to carry a cargo from Rosario to Europe. The vessel arrived at Rosario, and her lay days commenced to run at midnight on May 19, 1920. At the rate of loading provided for in the charterparty the lay time expired at 4 P.M. on June 4. Loading was not in fact completed until June 15 at 11 A.M. The respondents claimed demurrage for ten days nineteen hours at the agreed rate. The claim was referred to arbitration. The umpire stated his award in the form of a special case. Subject to the opinion of the Court he allowed demurrage from 4 P.M. on June 10 to 11 A.M. on June 15—namely, four days nineteen hours. The appellants moved to set aside the award, and this motion came on for hearing before Bailhache J. at the same time as the special case. The learned judge dismissed the motion, but varied the award by allowing demurrage for six additional days. From this decision the present appeal is brought. I see no reason for interfering with the judge's view that no ground was shown for setting aside the award. Whether the umpire's original view, or the judge's amended view, as to the allowance of demurrage is right depends upon the construction to be placed upon the charterparty, and its application to the facts as found by the umpire.

The material provisions of the charterparty are (*a*) that the shipowners bound themselves to receive a full and complete cargo of wheat and/or maize and/or rye, with an option to the charterers of shipping certain other lawful

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merchandise; (*b*) that the steamer should be loaded at the rate of 500 tons per running day, Sundays and holidays excepted, otherwise demurrage should be payable; and (*c*) that the loading should be subject to the exceptions contained in cl. 30, the material part of which is in the following terms: "If the cargo cannot be loaded by reason of . . . . a strike . . . . of any class of workmen essential to the loading of the cargo or by reason of obstructions or stoppages beyond the control of the charterers on the railways or in the docks or loading places . . . . the time for loading . . . . shall not count during the continuance of such causes." The appellants contend that they are completely protected by the provisions of this clause, and that no demurrage is payable. Their contention upon the facts as found by the umpire is that any delay in loading the cargo was due to obstructions or stoppages beyond the appellants' control on the railways or in the docks or other loading places. It lies upon the appellants to satisfy the Court that the umpire has found the facts in such a way as to bring cl. 30 into operation. The question whether the clause applies only to the operation of loading, or whether it extends to a bringing down of a cargo does not arise unless the umpire has found that a cargo existed and that an obstruction on the railways existed to both of which the clause could apply. In my opinion, the appellants' case breaks down on this last point. The finding of the umpire on both questions is contained in para. 19 of the special case. He finds: "On the 15th May, 1920, there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a 'go slow' or 'ca canny' movement, and lasted till the 6th June. It was a concerted scheme on the part of the employees of the company, designed to force the company to withdraw certain regulations which the Government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but by means of an extravagantly strict adherence to the various rules of the company

in regard to the working of traffic and the performance of their ordinary duties, so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving to the railway company any specific ground for dismissal. I hold that this was an 'obstruction' on the railway, and I find that it caused in all a loss of six days. It caused delay however only in bringing cargo to the Port of Rosario and in no way affected the actual process of loading." Without attempting to define what will constitute an obstruction on a railway, I think that a good deal more must be shown than is indicated in this paragraph. Men may refuse to work to their full, or even their normal capacity, for a variety of reasons. It may be because of some dispute with the employer, it may be from a general policy of reduction of output, and it may be from climatic considerations, extreme heat or extreme cold. If all that can be said in the case of a railway company is that such a refusal delays the working of the traffic, I do not think that an obstruction on the railway is proved. A delay in working the traffic may or may not produce, or amount to, an obstruction on a railway. It is not enough, in my opinion, for the party on whom the onus of proving the existence of an obstruction on a railway lies, to give evidence of a state of things which may or may not have amounted to an obstruction. I do not read the umpire's award as a finding that the state of things he describes resulted in obstruction. I read it as an expression of the umpire's opinion that as a matter of law the state of things he describes is sufficient evidence of obstruction. I am not able to agree with this view. Upon the other question of fact I feel considerable doubt whether the umpire has found that a cargo existed to which cl. 30 could apply. I think from the conclusion at which he arrived that he must have intended so to find, and I deal with the remaining question raised by the case upon the assumption that he has so found.

On this last question the contention for the respondents is that the obligation on the charterers being to ship a cargo of wheat and/or maize and/or rye, it was the charterers' duty,

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directly the delay upon the railway became apparent, to immediately substitute maize, which was available, for the wheat which was not available, and that no time can be allowed the charterers to consider whether the substitution was necessary or to complete the alteration of arrangements. I do not so read the contract. The obligation of the charterers is to supply a full and complete cargo of wheat and/or maize and/or rye or other named lawful merchandise. It may well be that the charterers cannot escape a claim for breach of contract to supply such a cargo by saying that no wheat was procurable, if maize and/or rye were procurable. That conclusion is, however, a long way removed from the contention of the shipowners, which is that even if the charterers have decided to ship a cargo of wheat, and have made the arrangements to secure the same, which, apart from some unforeseen event, would have enabled them to fulfil their contract, yet if without default on their part the unforeseen event occurs and compels them to substitute maize and/or rye for wheat they are not to be allowed the necessary time to make up their mind what is best to be done, and to alter their arrangements accordingly, but are bound by the fixed time for loading laid down in the charterparty. I cannot so read the contract. I think that a term must be implied giving the charterers a reasonable interval of time to enable them to deal with the altered conditions. If this view is correct, there can be no reason for disturbing the arbitrator's view of what constituted a reasonable interval.

For these reasons I think that the appeal succeeds to the extent that the judgment should be varied by striking out so much thereof as gives the claimants a further allowance in respect of six days disallowed by the umpire. The appellants must have the costs of the appeal and before the judge, and the order of the Court is that the award of the umpire as stated in para. 22 of the special case stands.

SCRUTTON L.J. This is a claim by shipowners on charterers for demurrage of a ship at Rosario, in which the arbitrator has given the shipowners four days nineteen hours demurrage

and stated a special case; Bailhache J. has given the shipowners an additional six days demurrage; and the charterers appeal to this Court. The charter is on the form known as the "Chamber of Shipping River Plate Charter, 1914," which was agreed between the Chamber of Shipping and the representative body of the Argentine shippers. It contains phrases not easy to construe, as is often the case when parties with conflicting interests adopt an ambiguous form which each side dare not make precise for fear the other party should disagree with their meaning if stated precisely. The ship was chartered to load at one or two ports in the River Parana, and the charterers named Rosario. She was chartered to "receive a full and complete cargo of wheat and/or maize and/or rye" with an option to charterers to load other lawful merchandise. The maximum cargo to be loaded was 5830 tons. She had fixed lay days, amounting to eleven days sixteen hours, with an exception clause. She came on time at midnight on May 19/20, and if no exceptions applied her lay days finished on June 4 at 4 P.M. The charterers began to load wheat, but by June 3 had only put on board 1900 tons. They began loading maize on June 10, and finished on June 15 at 11 A.M., having then loaded a full cargo. The shipowners claimed demurrage from June 4 to June 15. The charterers relied before the arbitrator on a number of causes of delay; the arbitrator negatived the existence in fact of all of them except two: (*a*) a prohibition by the Government of export of wheat from June 4 to June 11; and (*b*) a "ca canny" movement on the Central Argentine Railway, one of the five railways bringing wheat from the interior to the port of Rosario. In this "warlike operation" the workmen while working their full working hours, and doing nothing which would give the railway company a legitimate excuse for dismissing them, so punctiliously and conscientiously obeyed the letter of the railway company's rules, that work did not proceed with that speed that less conscientious workmen might have attained. The movement existed up country on this one railway from May 15 to June 6, and as the arbitrator finds caused six days' delay from ordinary working.

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In other words the loading which would have been completed on June 3, by the operation of the strike would not be completed till June 9. But on June 4 the prohibition of wheat export began; on June 10 the charterers began to load maize. The arbitrator has found that the strike would have delayed loading six days; and for the last six days of that period there was also the illegality of loading wheat, but as these two periods in his view coincided he only gave one six days' excuse from demurrage, and allowed demurrage from June 10 to 15, four days nineteen hours. Bailhache J., agreeing with a previous decision of Rowlatt J. on the same charter, holds that where a charterer undertakes to load a mixed cargo of various named kinds, the fact that he is prevented from loading one ingredient of the cargo does not excuse him from loading the other ingredients which he is not prevented from loading. I agree with this view, which appears to follow from the decision of this Court in *The Rookwood*. (1) If when the ship arrived the loading of wheat was forbidden, I do not think the charterer could say: "I am excused from loading any cargo, for I am prevented from loading the cargo I intended to load." The shipowners' answer would be: "You have contracted to load a full and complete cargo of wheat and/or maize and/or rye. If you cannot load wheat, load maize or rye, which you can load." If the charterer failed he would have to pay dead freight. Similarly if the shipowner claims demurrage because the charterer has not loaded the cargo he has contracted to load in the agreed time, it is no answer to the charterer to say, "I was prevented from loading one sort of that cargo"; he was not prevented from loading other kinds of that cargo. If it is said the charterer had the right to select the cargo to be put on board, and when he had selected it, it became the only chartered cargo, I can see nothing in the facts found to bind the charterer to ship only wheat. No doubt he intended to do so, but if he had changed his mind and shifted from wheat to maize how could the shipowner have objected? I disagree, therefore, with the view that because the

(1) 10 Times L. R. 314.

charterers intended to ship wheat they were not bound to ship maize or rye. Of course they were not bound to ship maize if they shipped a full and complete cargo of wheat; but if they could not do this, they still had contracted to ship a full and complete cargo of wheat and/or maize and/or rye, and must make up their full cargo of goods they could ship. But I do not go the full length of Bailhache J.'s judgment. If the charterers were shipping a contract cargo of a particular kind, and were stopped by an excepted cause from shipping that kind of cargo, I think they are allowed as the consequence of that excepted cause a reasonable time to consider the position and change their cargo, and may say that to the extent of that time they were delayed by the cause which prevented shipment of the first kind of cargo. This must be on the assumption that they had the first kind of cargo ready for shipment but for the excepted cause; and I am not sure, in view of the fact that when the cause, prohibition, stopped they shipped only maize and not wheat, that they had wheat available; but the experienced arbitrator has found that the six days they waited was not unreasonable, and while I do not think I should have given so long, it is a question of fact on which I cannot interfere with the arbitrator. This, however, assumes that the cause of delay was within the exceptions. The exceptions, cl. 30, are as follows: "If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstruction or stoppages beyond the control of the charterers on the railways, or in the docks, or other loading places"—and then there is the clause about discharge —"the time for loading or discharging, as the case may be, shall not count during the continuance of such causes." And it is said that the "ca canny" movement is "an obstruction . . . . beyond the control of the charterers on the railways," by reason of which the cargo cannot be loaded. I have had some doubt whether men working their normal hours and observing the rules of the railway in such a way that the railway company cannot say the men are

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breaking their contract can be said to be "an obstruction" within the meaning of the clause, any more than a goods train running to its scheduled time could be said to be "an obstruction," but the arbitrator has found the movement or strike and its results to be "an obstruction," and I think it was a matter for him. But a more serious difficulty is the question whether anything outside the port of Rosario which prevents the cargo being brought down to the port of loading is within the exception clause at all. It is a well recognized rule of construction that the exception clauses only apply to protect a charterer who has his cargo ready at the port of loading, unless they are clearly worded so as to include matters outside the port of loading. This is the result of *Grant & Co.* v. *Coverdale & Co.* (1) and *Arden Steamship Co.* v. *Weir & Co.* (2); it is so stated in the late Mr. Carver's work in para. 257. The language of Lord Dunedin in *Arden Steamship Co.* v. *Mathwin & Son* (3) puts it very clearly: "It is amply settled that, prima facie, there is an absolute duty upon a charterer to provide a cargo, and if he fails in that duty he undoubtedly will have to pay demurrage. Doubtless the charter after all is a bargain, and the charterparty might be so framed as to give an excuse from this duty of providing a cargo. But if that is to be so, the excuse must be very clearly expressed in the charter, because, unless this is very clearly expressed, the duty is, as I have phrased it, an absolute duty"; and again: "It is amply settled by authority that loading is one thing and providing a cargo is another, and an accident which may prevent a cargo coming forward is not to be construed as an accident which delays the loading, although, of course, unless the cargo is forward the loading cannot go on." But if there is only one way of bringing cargo to the port of loading, the exceptions may be taken to extend to that way, as in the case of *Hudson* v. *Ede*. (4) This extension does not apply if, as in the present case, there is more than one route by which cargo can come and only one route is obstructed: see the explanation of *Hudson* v. *Ede* (4)

(1) 9 App. Cas. 470.
(2) [1905] A. C. 501.
(3) 1912 S. C. 211, 215.
(4) L. R. 3 Q. B. 412.

in *Grant & Co.* v. *Coverdale & Co.* (1) and the decision of this Court in *Stephens* v. *Harris & Co.* (2); also Carver, para. 257b. So also if the exceptions in terms extend beyond the port of loading, as where, in the case of coal and mineral cargo, they refer to miners, and obstructions in getting the cargo, the ordinary rule is displaced. But in my view the exception which is read against those relying on it must be clearly worded to displace the ordinary presumption. As Lord Macnaghten said: "An ambiguous clause is no protection." (3) Clause 30 is to apply to all sorts of ports on the Parana. It speaks of railways and docks, and is to apply to ports which may or may not have railways, and may or may not have docks. Rosario has railways in the port, but no docks. In my view the ordinary presumption limits the word "railways" to railways in the port of loading, obstructions on which delay a charterer who has a cargo ready for loading. As a considerable portion of the loading at Rosario is done by chutes from trucks on the railway along the cliff or wharf, ample meaning can be given to "railways" without extending the term to railways up country, especially when there are five such railways and only one is obstructed. In my view, therefore, the "ca canny" movement and the obstruction it caused do not come within the exception clause. It was suggested that the sentence beginning "in case of any delay" extended the operation of the clause. So far as claims by charterers or receivers of cargo are concerned they could only be against the shipowner for delay in loading or discharging, the shipowner having nothing to do with up country matters, and the mention of the shipowner only seems to me to be an extra cautious repetition of the earlier part of the clause, and only on the ordinary presumption to relate to causes at the port of loading. The effect of this view is to prevent the time for which the "ca canny" movement obstructed the loading from being deducted from the lay days, and at midnight on June 3/4 there were sixteen hours left of lay days. The ship began loading again on July 10, being excused by the prohibition and the arbitrator's finding

(1) 9 App. Cas. at p. 477.
(2) 57 L. J. (Q. B.) 203.
(3) *Elderslie* v. *Borthwick* [1905] A. C. 93, 96.

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as to reasonable time till that day, and her lay days expired at 4 P.M. on July 10, leaving four days nineteen hours as the time on demurrage, being the amount found by the arbitrator, though for different reasons.

In this event the decision of the arbitrator as to the costs of his award should stand, but as this is said to be a test case, and in my view the charterers were wrong as to the effect of the cargo clause and wrong as to the inclusion of the "ca canny" movement, while the shipowners were wrong as to the effect of the prohibition on the time for determining on a change of cargo, I think neither party should have costs before Bailhache J. or here.

I should add that the arbitrator treated the time lost by the "ca canny" strike and the time lost by prohibition as coincident, and therefore only allowed that time once. He apparently proceeded on the ground that but for the strike, if it acted alone, the ship would have finished loading on June 10 instead of June 4, and as there was a prohibition from June 4 to June 10 the two dates were coincident. This may not be right, for if the excepted cause acted, say, on June 1 for one day, completion of loading would be delayed from June 4 to June 5, and if on June 4 there was another one day's delay, the charterer would be entitled to two days' excuse, and not one only on which two causes operated. It turns on when the first delay operated, which the arbitrator professes himself unable to say. I think he was probably wrong in his view, but as I arrive at the same figures of result by holding him wrong on two points, it is not necessary definitely to decide this.

Though I arrive at the same result as the arbitrator I have stated the matters on which I differ from him, as it is said that this case may affect a number of other demurrage cases at this time.

ATKIN L.J. The first question that arises in this case is the claim of the charterers for an extension of the expiration of the lay days by reason of the provision in cl. 30 as to "obstruction or stoppages beyond the control of the charterers on the railways." The umpire has found that

the organized action of the employees on the Central Argentine Railway was, or caused, an obstruction. I think that this finding should stand. The word "obstruction" in my view may include both the physical condition which interferes with the normal flow of traffic, and abnormal industrial conditions which cause the normal flow of traffic to be impeded. In the present case I think that the arbitrator meant to find both. I cannot doubt that he meant to find that there was a glut of wagons on the line preventing the normal flow of traffic, and that there was an abnormal industrial condition which produced that diminished flow. I think that he could properly find that "obstruction" existed. The obstruction was on the Central Argentine Railway up country from Rosario, and the question is whether such an obstruction can be said to be "on the railways," within the meaning of the clause. Prima facie such a clause only protects the shippers when it affects the actual process of loading, that is, putting the goods from quay or lighter into the ship, and this prima facie construction is founded on the primary obligation of a charterer to have his cargo ready for shipment at the port of loading when the ship is ready to receive it: *Grant & Co.* v. *Coverdale & Co.* (1) Nevertheless this prima facie construction can be displaced, as for instance when the circumstances of business in relation to the particular goods to be shipped are such that the shippers cannot have the goods ready at the port of loading, but must necessarily convey them from some other place to the port or place of loading. In such circumstances the exceptions, if apt words are used, may apply to causes operating outside the port of loading. It matters little whether the right view be that the prima facie construction is varied, or that the process of loading in such conditions is deemed to include the conveyance of the goods to the place where alone the shipper can have them ready. The kind of case where the prima facie meaning is extended is to be found in *Hudson* v. *Ede* (2), the conveyance of grain from warehouse towns on the Danube to Sulina; and *In re Richardson and Samuel* (3), conveyance of ore from Baku to Batoum. It would be found

(1) 9 App. Cas. 470. (2) L. R. 3 Q. B. 412. (3) [1898] 1 Q. B. 261.

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to be illustrated by and usually specially provided for in charters for the conveyance of coal or ores, which are not usually stored at the port of loading. But in every case it appears to me that the words in a charter in this connection must be construed in reference to the particular conditions of the actual transaction to which the charter is applied. We were told in argument that there are safe loading ports or places in the River Parana not higher than San Lorenzo, in which there are no warehouses and to which a grain cargo can only be brought to the ship by rail and must be loaded from trucks. To such a loading at such a port I think the word "railways" in this charter would apply, and the charterer would be protected if, having a cargo otherwise ready, the loading of the cargo was prevented or delayed by an obstruction on the railways up country conveying the cargo to the ship. On the other hand, if the clause was sought to be applied to one of such ports or places where the cargo was customarily ready in warehouse, there would be no reason for departing from the prima facie construction as to the process of loading. Applying this view to the facts of this case, it appears to me that the charterer fails to show findings of the umpire which displace the prima facie rule. It is found that there is very considerable warehouse accommodation at Rosario; it is not found that the whole or part of the cargo is of necessity or even customarily loaded from rail, though that is one of the modes of loading; and there is an express finding—although in this there may lurk an ambiguity—that there was no reason why the respondents should not have had a full cargo ready for the *Castlemoor* on her arrival. Under those circumstances I think that the learned judge was right in not allowing the charterers the exemption claimed under this head.

It is unnecessary on this view to consider the umpire's finding and further finding as to the days lost by the cause in question being coincident with the days lost by the prohibition. But for the reasons given by my brothers this finding seems to be open to attack, and as at present advised I should not feel able to support it.

The second head of claim arises from the prohibition of export of wheat. It was argued on behalf of the shipowners that as the obligation was to load a full and complete cargo of wheat and/or maize and/or rye a prohibition confined to only one could not be said to prevent or delay the loading of the cargo. I think that in such a contract as this there is no such thing as an appropriation of cargo binding shipowner to shipper or shipper to shipowner, nor any question of final election of an option. The shipper retains control of his powers until the final ton is put on the ship, and as he retains his rights so he retains his liabilities. I think therefore that the prohibited export of one of the classes of grain cannot be said to prevent the ultimate loading of the cargo. Nevertheless, it may well delay it. The contract is made in relation to well known business conditions, and it would be surprising to find that a shipper of a cargo who intended to ship wheat should find that he had no protection at all in the event of a sudden prohibition imposed while he was in the process of loading wheat, on the ground that the law presumed that he also had ready for that ship a full cargo of maize and rye, and in some cases also linseed and rapeseed. The reasonable construction appears to me to be that in such a case, while the shipper must load a cargo in accordance with his contract and if he cannot load wheat must complete with maize or rye, yet if he shows that it took him a reasonable time to change over, he shows that he was delayed for that reasonable time, and if he cannot so load wheat from one of the excepted causes then he is delayed in loading the cargo by that cause for that reasonable time. The umpire has here found such a delay, and I see no reason for not giving effect to his finding. I think, therefore, that his award should stand and that the appeal should be allowed with costs.

Appeal allowed.

Solicitors for the appellants: *Richards & Butler.*

Solicitors for the respondents: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

J. F. C.

1924
June 5.

LELYVELD *v.* PEPPERCORN.

Landlord and Tenant — Emergency Legislation — Dwelling-house — Rent Restriction—Separate Flat—Standard Rent—Apportionment of Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 3.

The appellant, who was the owner of a leasehold house in the metropolis, had since before August 3, 1914, continuously let the second and third floors of the house to separate tenants. He had also before that date let to a tenant two rooms on the first floor at a rent amounting to 26*l.* a year. On August 1, 1922, he let to the respondent these two rooms together with two other rooms on the same floor at a rent of 58*l.* 10*s.* a year. The standard rent of the house as a whole was 70*l.* a year. On an application by the respondent under s. 12, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920, the county court judge held that the sub-section applied, and made an apportionment of the rent of the house as a whole, apportioning to the respondent's rooms a rent of 25*l.* a year:—

Held, that the county court judge was wrong in applying the sub-section, and that the standard rent of the respondent's rooms was that at which they had been first let in 1922—namely, 58*l.* 10*s.*

Woodhead v. *Putnam* [1923] 1 K. B. 252 distinguished.

Appeal from Clerkenwell County Court.

The house, No. 30 Colebrooke Row, Islington, in the county of London, consisted of a basement and four other floors. In the basement there were two rooms and a scullery, on the ground floor there were three rooms, on the first floor there were four rooms, two on the main landing and two on the half-landing, on the second floor there were three rooms, and on the third floor there were three rooms.

In 1897 the appellant became the owner of the lease of the house, and at first occupied the whole house himself. Since before August, 1914, he had continuously let the second floor and the third floor to separate tenants. He had also before that time let to a tenant two rooms on the first floor at a weekly rent of 10*s.*, he himself occupying the other two rooms on that floor. In 1922 he let the basement and ground floor. On August 1, 1922, he let to the respondent the four rooms on the first floor at a rent of 1*l.* 2*s.* 6*d.* a week, or 58*l.* 10*s.* a year.

The respondent made an application to the county court

under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3 (1), for the apportionment of the rent of the house as a whole for the purpose of determining the standard rent of the rooms in his occupation.

It was stated in evidence on behalf of the respondent that the standard rent of the whole house was 70*l.* and that the rateable value was 55*l.*, and these figures were not disputed.

The county court judge held that the case came within the principles of *Woodhead* v. *Putnam* (2), that the respondent was entitled to an apportionment of the rent of the house as a whole, which the judge treated as being 70*l.* a year, that the standard rent of the respondent's four rooms was not that at which they were first let to him in 1922, and that the amount to be apportioned to the said four rooms was 25*l.* a year, or 9*s.* 7*d.* a week.

The appellant appealed on the grounds that the judge was wrong in law in holding that the standard rent of the said rooms was 25*l.* a year, and in holding upon the evidence before him that in order to ascertain the standard rent of the said rooms it was necessary to apportion the rent of the house.

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:—

Sect. 12. "(1.) For the purposes of this Act, except where the context otherwise requires:—

"(*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let:

"Provided that, ... where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent; . . . ."

"(3.) Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

(2) [1923] 1 K. B. 252.

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S. R. Sidebottam (*R. N. Fox Andrews* with him) for the appellant. The county court judge was wrong in making an apportionment under s. 12, sub-s. 3, of the Act of 1920 of the rent of the appellant's house as a whole, for the purpose of determining the standard rent of the respondent's flat. Under s. 12, sub-s. 1 (*a*), the "standard rent" of a dwelling-house means the rent at which it was let on August 3, 1914, or if not let on that date, the rent at which it was last let before that date, or if first let after that date the rent at which it was first let. Here the respondent's flat was not let on August 3, 1914, or before that date, but it was first let after that date—namely, on August 1, 1922—and the rent at which it was then let—namely, 58*l.* 10*s.* a year—is therefore the standard rent of the respondent's flat. The standard rent of the respondent's flat cannot in the circumstances be determined under s. 12, sub-s. 3, by an apportionment of the rent of the house as a whole. The standard rent of a tenement can only be determined under that sub-section where, first, the tenement is a dwelling-house to which the Act applies, and, secondly, an apportionment of the rent of the whole house is necessary for the purpose of determining the standard rent of the tenement: see *Woodhead* v. *Putnam*. (1) That implies that the house as a whole has a standard rent to be apportioned. Here the house as a whole never had a standard rent, inasmuch as it was not let on August 3, 1914, nor does it appear that it was ever let before that date, nor has it been let since that date. Even if the house as a whole had a standard rent which could be apportioned, an apportionment ought not to be made in this case. If an apportionment were made for the purpose of determining the standard rent of the respondent's flat, it would also have to be made for the purpose of determining the standard rents of the other flats in the house, the separate standard rents of which have already been fixed. According to the apportionment made by the county court judge the appellant would receive only a rent of 25*l.* a year for the four rooms occupied by the respondent, which would be less than the rent of 26*l.*

(1) [1923] 1 K. B. 252, 255.

a year formerly received by him for two of these rooms only. The case of *Woodhead* v. *Putnam* (1) is distinguishable from the present case, because there the house as a whole was let on August 3, 1914, and it had therefore a standard rent on that date which could be apportioned. In *Sinclair* v. *Powell* (2) the apportionment was refused, but that case is even less applicable here, because there also the house as a whole was let on August 3, 1914, and the ground on which the apportionment was refused was that the house as a whole had lost its identity owing to its reconstruction into separate flats.

John Duncan for the respondent. The county court judge properly made an apportionment of the rent of the house as a whole under s. 12, sub-s. 3, of the Act of 1920, for the purpose of determining the standard rent of the respondent's flat. Under that sub-section a tenant is entitled to an apportionment of the rent of the whole house of which his tenement forms part where, first, his tenement is a " dwelling-house " to which the Act applies, and, secondly, an apportionment is necessary for the purpose of determining the standard rent of the tenant's dwelling-house: see *Woodhead* v. *Putnam*. (3) Here there can be no doubt that the respondent's flat is a dwelling-house to which the Act applies on whatever principle its standard rent be determined. Further, as the respondent's flat had no standard rent of its own at the date when it was let to him, it was necessary, for the purpose of determining its standard rent, to apportion the rent of the house as a whole. The house as a whole had a " standard rent " as defined by s. 12, sub-s. 1 (*a*), which could be apportioned among the tenements into which it was divided. It is true that the house as a whole was not let on August 3, 1914, or since that date; but it has been found as a fact that before that date it had a standard rent of 70*l.* a year, and that is therefore the rent to be apportioned. The county court judge has apportioned that sum under s. 12, sub-s. 3, and has assessed the rent of the respondent's flat

(1) [1923] 1 K. B. 252. (2) [1922] 1 K. B. 393.
(3) [1923] 1 K. B. 252, 255.

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at 25*l.* a year, and his decision is final and conclusive. The case of *Sinclair* v. *Powell* (1) is distinguishable, for there the house as a whole had been converted into separate and self-contained flats, so that its identity had been destroyed and an apportionment of its rent was no longer possible. The respondent cannot be deprived of the right to an apportionment by reason of the fact that some of the rooms in the house were already let before the respondent's rooms were let to him, or because the appellant has regrouped the rooms since the date at which the standard rent of the house as a whole was fixed. The respondent is at least entitled to an apportionment for the purpose of determining the rent of the two rooms on the half landing, which had never been let to any one before they were let to him.

ROWLATT J. This is a curious and somewhat difficult case, but I think that on the whole the appeal should succeed.

The appellant is the owner of a house consisting of a basement and four other floors. In 1922 the respondent became the tenant at a rent of 58*l.* 10*s.* a year of four rooms on the first floor, two on the main landing and two on the half landing, which had not before been let together.

On and since August 3, 1914, the second and third floors of the house were separately let, and on that date two of the rooms on the first floor, which were afterwards let to the respondent, were also separately let to a tenant at a rent of 26*l.* a year.

The respondent made an application under the Increase of Rent, &c. (Restrictions), Act, 1920, s. 12, sub-s. 3, for an apportionment of the rent of the house as a whole in order to determine the rent of his flat. Under that sub-section the rent to be apportioned is the rent at the date in relation to which the standard rent is to be fixed. Under s. 12, sub-s. 1 (*a*), "standard rent" means the rent at which the dwelling-house was let on August 3, 1914, or where it was not let on that date the rent at which it was last let before that date, or if it was first let after that date the rent at which

(1) [1922] 1 K. B. 393.

it was first let. The county court judge found that the standard rent of the house as a whole was 70*l.*, representing the rent at which the house was let on August 3, 1914, or the rent at which it was last let before that date. He made an apportionment of that sum, and fixed the rent of the respondent's flat at 25*l.* a year.

It seems to me that this is not a case in which there can be an apportionment of the rent of the house as a whole. The house as a whole never had a standard rent within the meaning of any part of s. 12, sub-s. 1 (*a*), which could be the subject matter of an apportionment. The house as a whole had not a rent within the meaning of the first part of that clause, because it was not let as a whole on August 3, 1914. The second part of that clause does not apply, because it cannot be said that the house was not let on that date, as parts of it were let on that date and had acquired their own standard rents. The last part of the clause does not apply, as the house was not let as a whole after that date. That which the respondent desired should be apportioned was a thing which did not exist. The only standard rent which appears to me to be applicable to the appellant's flat is the rent at which it was first let to him in its present form in 1922—namely, 58*l.* 10*s.* a year.

If the tenant who occupied two rooms on the first floor on August 3, 1914, had chosen to do so, he could have remained in possession of them at the rent of 26*l.* a year. The respondent took these two rooms and two others on the same floor. He then made an application for apportionment, and obtained a reduction of the rent of the four rooms to 25*l.* a year, which is below the rent that had previously been paid for two of the rooms only. A view which makes that possible is, I think, clearly unreasonable.

In my opinion this appeal should be allowed.

BRANSON J. I agree. I was at first considerably impressed by the case of *Woodhead* v. *Putnam* (1), which was relied upon on behalf of the respondent, but it is clear that

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that case has no application to the present case. The right to an apportionment under s. 12, sub-s. 3, of the Act of 1920, of the rent of a house which has been divided up into parts only arises where the apportionment is necessary for the purpose of determining the standard rent of a part of the house. One of the cases in which the apportionment may be made is that in which the house was let as a whole on August 3, 1914, and the rent of the part is to be taken by reference to that date. That was the case in *Woodhead* v. *Putnam* (1), where the house as a whole was let on that date, and the Divisional Court held that an apportionment of the rent might properly be made in order to determine the standard rent of one of the floors which had been separately let. In the present case the facts are different. This house was not let as a whole in 1914, but on the contrary the second and third floors and two rooms on the first floor were then let as separate dwellings. Afterwards, in 1922, these two rooms on the first floor along with two other rooms on that floor were let together for the first time to the respondent. The respondent says that, because he is the tenant of four rooms in the house, he is entitled to an apportionment of the rent of the house as a whole. He cannot have an apportionment of the rent of the whole house as in 1914, because the house as a whole was not then let. Nor, as has already been explained, can he obtain an apportionment as at any other date. The standard rent of the respondent's tenement of four rooms is that at which it was first let in 1922.

Appeal allowed.

Solicitors for appellant: *Braund & Hill.*
Solicitors for respondent: *Bono & Nimmo.*

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J. R.

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July 28.

Landlord and Tenant—Leasehold Dwelling-house—Letting of Part by Lessee—Claim for Possession—Mortgage by Lessee—Attornment by Mortgagor—Rent of Peppercorn—Lessee, whether Landlord or Tenant—Application of Rent Restriction Act to House—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 7—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

The plaintiff in 1920 acquired the lease of a dwelling-house, which had an unexpired term of thirty-one years. In 1921 she mortgaged her leasehold interest in the house by a sub-demise which contained an attornment clause and attorned tenant to the mortgagee at a nominal rent of a peppercorn. The mortgagee did not enter into possession under the mortgage. The plaintiff resided in the house and let a portion of it. In December, 1923, after the passing of the Rent and Mortgage Interest Restrictions Act, 1923, the plaintiff let a room in the house to the defendant. Subsequently the plaintiff gave the defendant notice to quit, and claimed to recover possession of the room, alleging that the Rent Restrictions Acts had ceased to apply to the house by virtue of s. 2, sub-s. 1, of the Rent Restrictions Act of 1923. The defendant contended that as the plaintiff had attorned tenant to the mortgagee she had ceased to be a landlord and had become a tenant of the house, and that consequently the Rent Restrictions Acts still applied to the house by virtue of the proviso to s. 2, sub-s. 1, of the Act of 1923 :—

Held, that as the rent reserved under the attornment clause in the mortgage—namely, a peppercorn—was less than two-thirds of the rateable value of the house, the tenancy created by the attornment must under s. 12, sub-s. 7, of the Rent Restrictions Act, 1920, be regarded for the purposes of the Rent Restrictions Acts as if it had never existed, and tha therefore under s. 2, sub-s. 1, of the Act of 1923 the Rent Restrictions Act ceased to apply to the house.

Held, also (by Lord Darling), that the holder of a long lease of which a substantial portion remains unexpired is for the purpose of s. 2, sub-s. 1, of the Rent Restrictions Act, 1923, in the position of a landlord and not of a tenant.

Appeal from Birmingham County Court.

The plaintiff, Mrs. Jenkinson, in December, 1920, purchased the lease for ninety-nine years of No. 81 Francis Road, Edgbaston, of which thirty-one years remained unexpired.

In September, 1921, the plaintiff mortgaged her leasehold interest in the house for 400*l*. The mortgage was by a sub-demise of the whole unexpired term less the last day, and it contained an attornment clause by which the plaintiff attorned tenant to the mortgagee at a rent of a peppercorn.

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The mortgagee had never taken possession of the house under the mortgage.

The plaintiff resided in the house herself and also let rooms in it to various persons. In December, 1923, the plaintiff let a room in the house—which she had herself occupied for two months subsequent to July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923—to the defendant on a weekly tenancy at a rent of 12*s.* 6*d.* per week. This tenancy was duly determined by a notice to quit. The defendant then declined to pay any more rent and refused to give up possession.

The plaintiff thereupon brought this action in the county court to recover possession of the room. The defendant claimed the protection of the Rent Restrictions Act, 1923, but the plaintiff alleged that the Act did not apply, as the part of the house which was let to the defendant had been previously let, and the former tenancy had expired, and so the plaintiff was in possession of the whole of the dwelling-house at or after the passing of the Rent Restrictions Act, 1923, and that therefore the house had become decontrolled within s. 2, sub-s. 1, of the Act. To this contention the defendant replied that the plaintiff was not the landlord of the house in question, as she had mortgaged the same and had attorned tenant to the mortgagee pursuant to the attornment clause in the mortgage deed.

The county court judge held that the effect of the attornment clause, and of the attornment in fact, was to place the plaintiff in the legal position of being not owner of the house in question but tenant of the same, and that she came within the proviso to s. 2, sub-s. 1, of the Act, and that consequently the Act still applied to the part of the house occupied by the defendant. In the exercise of his discretion under the Rent Restrictions Act he refused to make an order for possession.

The plaintiff appealed.

W. E. Beckett for the plaintiff. The county court judge was wrong in holding that because the plaintiff had attorned

tenant to the mortgagee she had ceased to be the landlord of the premises and become the tenant of the same, and that therefore the proviso to s. 2, sub-s. 1, of the Act of 1923 (1) applied, and the house was not decontrolled. The proviso was only intended to apply to the case of an ordinary tenant sub-letting in order to prevent him getting his sub-tenant out and reletting at an increased rent, while his own tenancy was protected by the Act. The plaintiff cannot properly be described as the tenant of the premises. The attornment clause was only a precautionary measure. If the contention of the defendant was correct it would make sub-s. 2 ineffective in all cases where the property was mortgaged and the mortgage contained an attornment clause or in the case of leasehold property. Moreover s. 12, sub-s. 7, of the Rent Restrictions Act, 1920, provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy, nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." The rent reserved by the attornment clause in the mortgage was a peppercorn; that is clearly less than two-thirds of the rateable value of the house, and therefore the tenancy created thereby must be disregarded, in which case s. 2,

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house: "Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sub-let by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sub-let, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act."

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sub-s. 1, applies, and the Rent Restrictions Acts do not apply to the house. It might be contended that inasmuch as the plaintiff was only the lessee of the premises he was a tenant, but it is submitted that the holder of a long lease like the present lease can be properly described as a landlord within s. 2, sub-s. 1, of the Act of 1923 (1). The definition of "landlord" in s. 12, sub-s. 1 (*g*), of the Rent Restrictions Act, 1920, is wide enough to cover the holder of a long lease.

[LORD DARLING. If the holder of a lease for ninety-nine years is not a landlord neither can the holder of a lease for 999 years be described as a landlord. But that would obviously lead to an absurd result.

ROWLATT J. The holder of a lease for ninety-nine years of which only one year remained unexpired would be entitled, on the expiration of that year, to claim the benefit of the Rent Restrictions Acts as being a tenant.]

But when a substantial portion of the term remained unexpired, as in the present case, the holder would be regarded for the purposes of the Rent Restrictions Acts as a landlord and not as a tenant. Moreover, in most cases s. 12, sub-s. 7, would also be an answer to such a contention, as the rent reserved by a lease is usually less than two-thirds of the rateable value of the house.

The defendant was not represented and did not appear.

LORD DARLING. This case raises a troublesome and difficult point, and it has been exceedingly well argued by Mr. Beckett, who has put before us not only the contentions favourable to himself but also every argument which an opponent could have employed if he had been here.

The plaintiff had acquired a lease for ninety-nine years of a house of which term thirty-one years were unexpired. The first question that arises is whether she can properly be called a landlord within the meaning of the Rent Restrictions Acts when she let a part of the house to a tenant. It might

(1) See note (1) ante, p. 647.

be contended that the holder of a lease is not a landlord within the meaning of those Acts, but in my opinion if such a person is not a landlord the holder of a lease for 999 years may equally be said not to be a landlord, which would obviously lead to an absurd result. I cannot think that the test whether or not a person is the landlord of a dwelling-house depends upon whether he is the owner of the house in fee simple as opposed to the holder of a term of years. I have therefore come to the conclusion, there being a substantial portion of the term unexpired, that the plaintiff is a landlord within the meaning of the Rent Restrictions Acts.

The plaintiff mortgaged her leasehold interest in the house in question and attorned tenant to the mortgagee, and the county court judge held that, by reason of the proviso to s. 2, sub-s. 1, of the Rent Restrictions Act, 1923, the house was still controlled under the Rent Restrictions Act, 1920, because the effect of the attornment was to make the plaintiff not the owner of the house but a tenant. I think that Mr. Beckett has discovered a good answer to that contention in s. 12, sub-s. 7, of the Rent Restrictions Act, 1920, which provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." Now if the rent reserved by the attornment clause in the mortgage was less than two-thirds of the rateable value of the house the Act of 1920 never applied to that tenancy. The plaintiff attorned and became tenant at will to the mortgagee at a rent of a peppercorn. It is inconceivable that a rent of a peppercorn is not less than two-thirds of the rateable value of the house, and therefore this point that has been taken by Mr. Beckett is a good one, and the Act of 1920 never applied to the tenancy created by the attornment, and that tenancy must be regarded as if it had never existed. Therefore under s. 2, sub-s. 1, of the Act of

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1923 the Act of 1920 ceased to apply to the house, provided that it be held that the plaintiff although a mortgagor is nevertheless a landlord within the meaning of the Act of 1923. I have come to the conclusion, as I have already said, that the plaintiff is the landlord of the house within the meaning of the Act. She is therefore entitled to an order for possession, and the defendant is not entitled to any relief under the Act of 1923. The appeal must therefore be allowed.

ROWLATT J. I am of the same opinion. The county court judge decided the case on the ground that the plaintiff became the tenant of the mortgagee for the purposes of the Act by reason of the mortgage by sub-demise which contained an attornment clause by which the plaintiff attorned tenant to the mortgagee at the rent of a peppercorn. In my opinion that fact is quite immaterial. The plaintiff is not in possession of the premises because she attorned tenant to the mortgagee at the rent of a peppercorn, but because she is the holder of the unexpired term of the lease and therefore the owner of the property. I think this case is amply covered by s. 12, sub-s. 7, of the Rent Restrictions Act, 1920, which provides that the Act shall not apply to the tenancy of a house where the rent reserved is less than two-thirds of its rateable value. In the present case the rent reserved by the attornment clause in the mortgage was a peppercorn, which is obviously less than two-thirds of the rateable value of the house, and therefore for the purposes of the Act that tenancy must be regarded as if it had never existed. That is sufficient to decide this case.

There is another point which might have emerged if it had been taken in the county court—namely, it might have been said that inasmuch as the plaintiff was the lessee of the property for an unexpired term of years, she was therefore herself a tenant, and the house was still within the Rent Restrictions Acts by virtue of the proviso to s. 2, sub-s. 1, of the Act of 1923. I do not know whether or not such a contention could be

supported. It was however not raised before the county court judge and therefore does not arise here. It may be that on the facts s. 12, sub-s. 7, of the Act of 1920 would have been an answer to that point also.

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Appeal allowed.

Solicitors for plaintiff: *Timbrell & Deighton, for S. Guest Hooper & Co., Dudley.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.

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July 18, 22.

DAVIES *v.* GWAUNCAEGURWEN COLLIERY.

Workmen's Compensation—Accident arising out of and in the Course of the Employment—Fatal Accident—Acts done "for the purposes of and in connection with his employer's trade or business"—Prohibited Area—Acts merely incidental to Employment—Hanging up Coat—Returning to Work—Workmen's Compensation Act, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 7.

In contravention of his employers' express orders a workman unnecessarily went into a prohibited area to hang up his coat, and on turning round to return to his proper working place fell into a hole and was fatally injured. His widow claimed compensation, contending that the workman's acts of hanging up his coat and returning towards his work were acts done "for the purposes of and in connection with his employers' trade or business," so that under s. 7 of the Workmen's Compensation Act, 1923, the fatal accident was to be "deemed to arise out of and in the course of his employment notwithstanding that the workman was . . . . acting in contravention of" his employers' orders.

The deputy county court judge held that the acts were done for the workman's own purposes and not for the purposes of or in connection with his employers' trade or business, so that s. 7 did not apply.

On the widow's appeal:—

Held, that the deputy judge's decision was right.

Observations on the limited scope and effect of s. 7.

Per Pollock M.R. Whether the section would apply in the case of an added peril, such as in *Lancashire and Yorkshire Ry. Co.* v. *Highley* [1917] A. C. 352, *quaere?*

Per Warrington L.J. The section does not apply to acts merely incidental to the employment.

Per Atkin L.J. Whether the section would apply to acts having no causal relation to the accident, or to acts at a workman's home, or to the acts of domestic servants, *quaere?*

But (*semble*) although it would apply to unauthorized or forbidden

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conduct within the sphere of employment, it would not, as a rule, apply to acts in a prohibited area, such acts being prima facie altogether outside that sphere.

APPEAL from Ammanford County Court.

The deceased workman in this case had been a faithful and valued servant in the defendants' employ for many years as a screenman. His working place was on the front part of the first floor of the screens. The rear part had been disused for some ten years, and there was no necessity for him or his fellow-workmen to go there for any purpose, accommodation for hanging up coats and taking meals being provided by a cabin on the ground floor and another on the front part of the first floor.

For many years however the deceased workman with his employers' knowledge had been in the habit of hanging up his coat with food in the pocket on a nail in the disused part and taking his meals there. No other screenman did either of these things.

On February 8, part of the flooring of the disused part being in a dangerous condition, a rail was put up to prevent access, and the deceased workman was forbidden to go there. He was in fact not seen there by any official after that.

On February 13, a dark morning, he arrived early, switched on the electric light as his first act of employment, and then, having probably got under the rail, went to the disused part for the purpose of hanging up his coat on his accustomed nail. This he apparently effected without mishap, as his coat was found hung up, but in turning round to go to the front part where he worked, he fell through an old machinery hole in the disused part and was so fatally injured that he died on February 26.

On March 12 his widow claimed compensation in the Ammanford County Court.

On June 14 the deputy judge made his award in favour of the employers. He found that the accident did not arise out of the employment, the workman being prohibited from going to the disused part and his employment not necessitating his going there. He went there for his own purpose,

to hang up his coat with the intention of taking his meal there later. In his note the deputy judge held that the accident did not arise out of the deceased's employment on the ground that his employment did not require him to go into the disused part. A rail had been erected to prevent access thereto, and he had been warned not to go there.

From the fact that the workman had actually hung up his coat the deputy judge inferred that the accident occurred as he was turning round, or had turned round to proceed from the disused part into the part where his sphere of employment was—i.e., while he was proceeding to his work, but was still outside the ambit of his employment.

As to s. 7 of the Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42) (1), he held that at the time of the accident the deceased was not doing anything for the purpose of or in connection with his employers' trade or business.

On July 4 the widow gave notice of appeal.

Charles K.C., *Clark Williams* and *T. W. Morgan* for the widow. Under the decisions up to December 31, 1923, this accident would not have arisen out of and in the course of the workman's employment, because, in contravention of his employers' orders, he was unnecessarily doing an act in a prohibited area.

That ground of objection is now conditionally removed by s. 7, category (*b*). The condition is that the act was done "for the purposes of and in connection with his employer's trade or business."

On this point the deputy judge has held in almost the exact

(1) The Workmen's Compensation Act, 1923, provides as follows:—

Sect. 7: "For the purposes of the principal Act" (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58)), "an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting (*a*) in contravention of any statutory or other regulation applicable to his employment, or (*b*) of any orders given by or on behalf of his employer, or (*c*) that he was acting without instructions from his employer, (*d*) if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

The letters (*a*), (*b*), (*c*) and (*d*) are inserted for convenience of reference.

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words of the statutory condition that, at the time of the accident, the deceased was not doing anything for the purpose of or in connection with his employers' trade or business. That of course involves the construction of the statutory condition and is a finding of law open to appeal: see Lord Atkinson's remarks on this class of finding in *St. Helens Colliery Co.* v. *Hewitson* (1) and in his own previous decisions therein referred to. The point is therefore open to review in this Court.

Now here the workman had commenced his employment by switching on the light. It was then his duty to hang up his coat in preparation for his screen work. Hanging up his coat somewhere and proceeding to his screen work after doing so were surely acts for the purposes of and in connection with his employers' trade or business, even though the coat was hung up for the workman's own convenience also, and possibly primarily for that purpose. Apart from the prohibition, which for this purpose may be neglected, they were certainly acts done in discharge of a duty "directly or indirectly imposed upon him by his contract of service" or "acts incidental to that contract" within the definitions of "course of employment" in *St. Helens Colliery Co.* v. *Hewitson.* (2)

On this point—namely, the construction of the condition—the fact that he chose a forbidden spot is immaterial. It is merely necessary to consider whether the condition was fulfilled. If so, the forbidden spot objection is removed by category (*b*), and the widow is entitled to compensation notwithstanding the prohibition.

Campion K.C. and *Frank Davies* for the employers. Apart from s. 7 the man was clearly outside the ambit of his employment, as he was in a prohibited area. The only question is whether he was acting for the purposes of and in connection with his employers' trade or business so as to bring s. 7 into operation. The deputy judge has held that he was not so

(1) [1924] A. C. 59, 79. The previous remarks are in *Herbert* v. *Samuel Fox & Co.* [1916] 1 A. C. 405, 413 and *Hutchison* v. *M'Kinnon* [1916] 1 A. C. 471, 476.

(2) [1924] A. C. 59, 71, 93.

acting, and assuming that to be a finding of fact, there is an end of the case.

If however it is mixed law and fact and not a final finding, it is still clear that the statutory condition does not apply to the other facts proved. Hanging up his coat somewhere might conceivably be an act for the purposes of his employers' trade or business. Unnecessarily entering a prohibited area for that purpose could not be so, and while there, even though returning to his work, he was not acting for the purposes of or in connection with his employers' trade or business.

[They were stopped.]

Charles K.C. replied.

POLLOCK M.R. [after stating the facts]. The widow contends that s. 7 of the Workmen's Compensation Act, 1923, which came into operation on January 1, 1924, applies to this accident. She contends that although as the law stood up to December 31, 1923, the deputy judge may have been right in law in holding that the accident did not arise out of and in the course of the workman's employment, yet by virtue of s. 7 the workman is once more brought within the privileges of the principal Act of 1906.

It is therefore necessary—and I think so far as this Court is concerned, for the first time—to consider the terms of s. 7. It is important to remember that the whole Act of 1923 is to be read with the principal Act. [His Lordship read the section to the end of categories (*a*), (*b*) and (*c*) and continued :] Now, pausing there for a moment, it is clear that the purpose of the section is to bring back within the ambit of the principal Act a workman who according to the decisions up to December 31, 1923, would not be within that Act. From and after January 1, 1924, a fatal or permanent disablement accident to a workman is to be deemed to arise out of and in the course of his employment, notwithstanding that he would be prima facie excluded from the principal Act by reason of the three categories (*a*), (*b*) and (*c*).

Now the terms on which he is to be brought back into the advantages of the principal Act are laid down in

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cl. (*d*)—namely, "if such act was done by the workman for the purposes of and in connection with his employer's trade or business." The section is not quite happily worded, because categories (*a*), (*b*) and (*c*) really describe a workman "acting" in a manner that would negative his right to compensation under the principal Act. The word "acting" obviously means doing some act within the categories. The basis on which he is to be brought back to the advantages of the principal Act is, "if such act was done by the workman for the purposes of and in connection with his employer's trade or business." In other words, an "act" within the three categories which up to December 31, 1923, would have prevented his reaping the advantages of the principal Act, may still not bar the workman if that particular "act" was done "for the purposes of and in connection with his employer's trade or business."

It is important to observe that a new phrase is introduced, a phrase which, so far as I know, has not been used in Workmen's Compensation Acts before, and that is "his employer's trade or business." The word is not "employment," but it is "employer's trade or business." The condition, which is to be the basis of the workman regaining his right to compensation, is twofold. The "act" must fulfil both limbs of the sentence. It has to be done "for the purposes of," and "in connection with," his employer's trade or business. Unless, therefore, the act done can be said to be both "for the purposes of," and "in connection with," his employer's trade or business, the section does not enure to the advantage of the workman.

In the present case the deputy judge has found upon abundant evidence that the workman was not doing anything either for the purpose of, or in connection with, his employer's trade or business. He finds that the "act" did not fulfil either limb of that condition, although, if the workman is successfully to pray the section in aid, the act must fulfil both limbs. Indeed, the deputy judge finds that in doing what he did the workman was acting for his own purposes, and he was still outside the ambit of his

employment. In other words his employment had not yet commenced. Now it seems to me that the deputy judge has applied his mind in law rightly to the problem that was set before him, and that there was abundant evidence on which he could come to the conclusion that he did on s. 7. For my own part I should like to say that on the materials before me I think he has come to a right conclusion.

It is doubtful whether it is wise for us to construe s. 7 generally at such an early stage of its operation, but I may say that in my opinion it was intended to operate upon such a case as *Bourton* v. *Beauchamp*. (1) In that case "a miner employed to get coal by pick or shot firing, on arriving at the coal face, saw a hole already drilled and stopped with stemming and the charred remains of a fuse. He proceeded to remove the stemming with a view to laying a fresh shot in the same hole when an explosion occurred which caused his death. The hole had been charged two days before, but the shot had missed fire. The use of explosives at the mine was regulated by statutory regulations made under the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), which provided that when a hole had been charged no part of the stemming should be removed, and that if a shot misfired a second charge should not be placed in the same hole." It was held that, inasmuch as the deceased was disobeying the statutory regulations, he was acting outside the sphere of his employment. Now that is a case in which the workman was acting in contravention of a statutory regulation. If s. 7 had then been in force it might, though not necessarily, have been held that the act was done by the workman for the purposes of, and in connection with, his employer's trade or business; and, if so held, it would have been possible to bring the workman back into the advantages of the principal Act.

On the other hand, I take another case which is more doubtful: *Lancashire and Yorkshire Ry. Co.* v. *Highley* (2), and I refer to it because I observe in a note to Chitty's Statutes,

(1) [1920] A. C. 1001. (2) [1917] A. C. 352.

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1923, p. 285, it is suggested that the law of that case has been altered. That was a case in which some workmen who were rightly in transit by train to their work, and who had to change at a junction, went across the line to a messroom where they could get hot water for their breakfast. It was unnecessary for them to cross the line; they might have gone by a safe route, but they selected that particular route, although it added an unnecessary peril. It was held there that the deceased, who was killed by some trucks under which he passed in getting to the messroom, was exposing himself to an added peril and was not acting within the sphere of his employment. Now it seems to me that it would not be right to say definitely, at any rate at the present time, that s. 7 would apply to *Lancashire and Yorkshire Ry. Co.* v. *Highley*. (1) It might well be, and I think probably would be, that upon such evidence it would be held that the act done by the workman was not for the purpose of, and in connection with, his employer's trade or business. I only refer to it in order to show that s. 7 may perhaps not be so wide as at first sight it is supposed to be, and that whereas *Bourton* v. *Beauchamp* (2) may be a case in which the workman is once more brought into the benefit of the Act, it would certainly be going too far at the present moment to say that the law as laid down in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1) has also been altered.

It is sufficient in the present case to say that if the accident is to be deemed to arise out of and in the course of the workman's employment within s. 7 his act or acting must fulfil both limbs of the condition. It must be done both "for the purposes of," and "in connection with," his employer's trade or business. The Court must consider the phrase "trade or business" and see if the act was done for the purposes of and in connection with it. Unless that condition is satisfied, s. 7 does not render the accident one which can be deemed to arise out of and in the course of the employment, so as to bring the workman back again within

(1) [1917] A. C. 352. (2) [1920] A. C. 1001.

the ambit of the principal Act. In the present case I think the deputy judge, on sufficient materials, has come to a conclusion which applies the right principle of law. The appeal must therefore be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This is the first case in which we have had to consider the construction and effect of s. 7 of the Workmen's Compensation Act, 1923, and it is therefore in that sense of some importance. [His Lordship stated the facts and continued :] The question is whether the accident arose out of and in the course of the workman's employment, or if not in fact so arising, whether it is to be deemed to have so arisen in consequence of s. 7.

I will assume for the present that so far as time is concerned the workman's period of employment had commenced. The lights were found switched on, and the evidence shows that on dark mornings he was in the habit of switching them on as soon as he arrived. I will assume therefore that this was his first act of employment, so that in point of time his employment had commenced, and prima facie anything that he did for the purpose of his employment or incidental to his employment would be in the course of his employment.

It is, however, quite plain that, but for s. 7, inasmuch as his death happened when he was doing an act in a prohibited area, it would have been held before the 1923 Act that the accident did not arise out of and in the course of his employment. Before that Act the circumstance just referred to would have excluded him from compensation, whether on the one hand the act he was performing was one for the benefit of his employers—e.g., an act done in a wrong place, but such an act as a man so employed might do for the purpose of his employer—or whether on the other hand it was an act done by the man for his own purposes, although incidental to his employment, such, for example, as going to his midday meal, which would be incidental to his employment, but in a place into which he was forbidden to go for that purpose.

The 1923 Act however has introduced a new phraseology for the purpose of keeping certain categories of acts out of

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the force of the previous decisions in that respect. Those categories are contained in s. 7. [His Lordship read s. 7 and continued:] Now but for the words at the end of the section, "if such act was done by the workman for the purposes of and in connection with his employer's trade or business," the effect of the first part of the section would have made the man entitled to compensation in both the classes of forbidden acts to which I have referred—that is to say, acts which were merely incidental to the employment and acts which were directly acts of his employment and for the purpose of his employment. But those last words have limited that prima facie effect of the section, and clearly indicate an intention to prevent it applying to acts merely incidental to the employment, and to confine its operation to acts done by the workman "for the purposes of and in connection with the employer's trade or business."

The key to the construction of the whole section is found in those last words. Why the Legislature has thought fit to introduce with the conjunction "and" the words "in connection with" the trade or business I cannot understand, because any act done "for the purposes of" the trade or business must be "in connection with" it, and it seems to me that the words "in connection with" add nothing whatever to the previous words. But in my judgment the intention of the Act was to bring within the ambit of compensation, in cases of death or serious and permanent disablement, those categories of acts which, though done for the purposes of the master's trade or business, would have been excluded by the previous decisions.

The deputy judge in the present case has found that the act in which the man was engaged at the time when the accident happened was not done by him for the purpose of and in connection with his employer's trade or business. There was ample evidence to support that finding, inasmuch as the accident happened while the workman was doing something for his own comfort and convenience and not in any way for the purpose of and in connection with the employer's trade or business. That class of act does not

come within the section, and therefore, although the accident resulted in the workman's death, his dependants are not entitled to compensation. I regret having to come to this conclusion in this particular case, because the man was evidently a very estimable person and I cannot help being sorry for his dependants; but that must not tempt us to come to a conclusion other than that which the law allows. The appeal fails, and must be dismissed with costs.

ATKIN L.J. It cannot be and was not disputed that this workman would not have been entitled to compensation unless he came under s. 7 of the 1923 Act. As has been pointed out by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (1) in a phrase which has been adopted over and over again, "there are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment." It is perfectly plain that this prohibition being an absolute prohibition to pass at all on to this forbidden area was a prohibition which limited the sphere of his employment.

Then we have to consider the terms of the section. It is not very artistically drawn. There is a fatality in legislating on workmen's compensation. It seems impossible to legislate in such clear terms as to avoid the possibility of dispute. I do not propose to read the section again. It is obvious that there are questions to be solved, but for the purposes of this case it is unnecessary to solve them. Therefore I do not propose to attempt any solution.

One obvious observation is that the section does not provide that the act which is in contravention of a statutory or other regulation should have any causal relation to the accident. I think that such a relation must have been intended. But I do not decide that, though I think it is obvious. Another observation is that it does not provide that the act should be done after the employment has commenced within the ordinary course of employment. It is consistent with the words of the Act that a workman

(1) [1914] A. C. 62, 67.

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doing an act at home at his own house for the purposes of his employer's trade or business might be entitled to compensation. I do not in the least propose to say whether that is the true construction or not. Another obvious observation is that the act must be done for the purposes of and in connection with his employer's trade or business. I think the question will arise whether the section protects domestic servants—i.e., whether it can be said that they are doing the act for the purposes of their employer's trade or business if they are doing an act which is concerned not with their employer's business. That is an interesting question which no doubt will have to be solved. For these reasons, as I have said, I think there is ground to support the observation I made in the course of the argument, that this section may prove to be a gilt-edged section for the legal profession.

It is quite plain that the section does confer substantial benefits upon workmen engaged in industry. It is all limited, however, by the condition that the workman's act therein referred to must be done for the purposes of and in connection with his employer's trade or business. Now in order to consider the bearing of that condition upon the law, a useful illustration from the old law may be found in *Conway* v. *Pumpherston Oil Co.* (1), decided by Lord Dunedin when Lord President and referred to by him in *Plumb* v. *Cobden Flour Mills Co.* (2) In *Conway* v. *Pumpherston Oil Co.* (1) a workman was working in a level from which an "upset" was being driven. The fireman having discovered an outbreak of gas in the upset placed a board across the entrance chalking on it "No road," which was the usual warning of danger. The workman understood what the board meant, but he required a pick, and knowing that a pick had been left in the upset, went to get it and passed over or under the fence with a naked light in his cap. An explosion took place, and he was killed. In that case it was held that the accident arose out of his employment; he was doing an

(1) [1911–20] L. R. Dig. 4004; 1911 S. C. 660, 665.
(2) [1914] A. C. 62, 66.

act for the purpose of his master's trade or business, and it was held that the prohibition against entering the upset did not limit the sphere of his employment, but only limited his occupation within that sphere. Lord Dunedin L.P. says: "It is obvious, I think, that there are two ways in which a servant may be outwith the sphere of his employment. One way —and in these cases the question is generally of easy solution —is where a servant does some other sort of work than that for which he is engaged. To take a very simple and obvious instance: If the footman on the box of a carriage, with the assent of the coachman, took it into his head to drive the horses, there would be no question, I think, that if any accident happened to him it would not be in the course of his employment, for it is not part of a footman's business to drive, although it is part of his business to sit upon the box. Then the other class of cases which raises more difficult questions, is where a servant goes into what I may call a territory with which he has nothing to do. An illustration of that may be got from the case of *O'Brien* v. *Star Line, Ld.* (1), where a seaman was found in the wrong part of the ship having fallen down into the hold from a quarter of the ship to which he had no right to go for anything connected with his work."

Those two instances illustrate the two different ways in which a workman can be outside the sphere of his employment. I am not quite sure that the footman is the best and clearest illustration, because the footman might be driving the horses by consent of his coachman, not for his employer's business, but for the amusement of both of them. But assuming he was driving the horses in the interests of his master's business, it would be such a case. It appears to me that the Legislature intended to give compensation in the first class of case referred to by Lord Dunedin, but not in the second.

The first class of case is illustrated by a whole series of authorities. I cannot help thinking that *Bourton* v. *Beauchamp* (2), the shot-firing case, is the best instance, and probably is the case that gave rise to the passing of this Act,

(1) 1908 S. C. 1258. (2) [1926] A. C. 1001.

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but there is a summary of cases in Mr. Willis's book, 22nd ed., p. 33, and I cite that because that appears to me to be very usefully and accurately summarized. The instances given by the learned editor are: "Thus, the accident was held not to have arisen out of the employment . . . . where an unskilled labourer, contrary to instructions, took on himself to clean machinery, for the purpose of filling spare time." For that he quotes *Lowe* v. *Pearson*. (1) Then, "Where a labourer temporarily undertook the duties of an engine-man, without lawful authority, and this although the accident consisted in slipping while getting down from the engine." For that he cites *M'Allan* v. *Perthshire County Council*. (2) Then, "Where the driver of a canal boat took the part of steering and managing the boat contrary to instructions," and so on. That class of case clearly, I think, was intended to be covered by the new Act, so that a workman hitherto unprotected will be protected in future under that section.

On the other hand, there is a series of cases where the workman was working in an unauthorized place. The learned editor gives instances of those, but all are not cases where he would be necessarily included by the new Act. In some he would be included, in some not.

The case however that will best test this new Act is *Brice* v. *Edward Lloyd, Ld.* (3) That is really precisely on all fours with the present case, and the construction of s. 7 may really be tested by asking whether or not it was intended to reverse that decision. In *Brice* v. *Edward Lloyd, Ld.* (3), a workman when working during the night shift took his supper for the sake of warmth seated on a tank in the pump room. His employers provided a dining-room for their workmen, but they were not bound to take their meals there. In getting off the tank, which stood five and a half feet high with a platform half way up on one side, the workman fell through an aperture in the tank, was scalded, and received injuries from which he died. The workman was not expressly prohibited from going on to the tank; but the evidence

(1) [1899] 1 Q. B. 261. (2) (1906) 43 S. L. R. 592.
(3) [1909] 2 K. B. 804.

was that he had no right to be there, and if found there he would have been dismissed. It was held that the accident did not arise out of the workman's employment. The Court of Appeal held that while it was perfectly true that workmen were entitled to take their meals on the premises, and it did not by any means follow that an accident happening to them while they were so taking their meals on the premises might not be an accident arising out of and in the course of their employment, that did not mean that a workman was at liberty to take his meals on any part of the employer's premises, however dangerous and unsafe the place might be, and a fortiori if it had been expressly prohibited.

I cannot distinguish the case of a man who being expressly prohibited from entering into an area goes there for the purpose of taking off his coat and the case of a man who being similarly prohibited goes there for the purpose of eating his meals. In both cases he goes there, not for the purpose of his employer's trade or business, but for his own purposes. It is true that while taking his meals or taking off his coat the employment has not been suspended if he is doing it in a proper place. But in no case can it be said that within this section he is doing that act for the purposes of his employer's trade or business.

In the present case the workman was expressly prohibited from going to the disused part ; it was a complete prohibition ; he had no business to go there ; it was completely railed off, and he could only go there by getting over or under the rail ; and what he was doing there he was doing for his own purposes. The fact that he had completed his own particular purpose of hanging up his coat and was returning to his screen is just as irrelevant as the fact that in *Brice* v. *Edward Lloyd, Ld.* (1), the man had finished eating his meal and was getting off the tank. He was going out of the prohibited area and going back to a place to commence his work. It is idle to say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business. That would

(1) [1909] 2 K. B. 804.

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be far too wide a construction of the section and would give very much more relief than was intended.

This workman's acts therefore were not within s. 7 properly construed, and the deputy judge's judgment, which seems to have proceeded entirely on these lines, was correct. The appeal must therefore be dismissed with costs.

Solicitors : *John T. Lewis & Woods, for Randell, Saunders & Randell, Swansea ; Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

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April 29, 30.

[IN THE COURT OF APPEAL.]

SIMPSON *v.* BATEY.

[1924. S. 23.]

Landlord and Tenant—Agricultural Holding—Questions and Differences—Reference to Arbitration—Termination of Tenancy—Question arising out of—Notice to quit by Tenant—Action of Ejectment—Waiver of Notice—New Tenancy—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 16, 54.

By s. 16 of the Agricultural Holdings Act, 1923, any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation under the Act, or for sums claimed by the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord for waste, or for any breach of contract or otherwise in respect of the holding, " and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding " . . . . shall be determined by a single arbitrator as therein provided.

The tenants of a holding gave notice to quit on a certain day. When the day arrived they refused to give up possession. The landlord brought an action of ejectment. The tenants pleaded that the notice to quit had been waived. They then applied to stay the action under the above section :—

Held (by Bankes and Warrington L.JJ.), that the question between the parties being whether the tenancy had or had not terminated was not a " question or difference arising out of the termination of the tenancy " and was therefore not within the section.

By Scrutton L.J. That the tenant was claiming to hold under a new tenancy : *Freeman* v. *Evans* [1922] 1 Ch. 36 ; that by s. 54 of the Act nothing, except as in the Act expressed, is to affect prejudicially any

right or remedy of a landlord, and that s. 16 does not bar a landlord from his remedy by ejectment on the termination of a tenancy, where the tenant claims to hold under a new tenancy the existence of which the landlord denies, for that question or difference does not arise out of the termination of the original tenancy, but is independent of it.

APPEAL from an order of Talbot J. in chambers affirming an order of the District Registrar of Carlisle refusing to dismiss the action in the following circumstances.

The action was brought to recover possession of Dubwath Farm in the parish of Heathersgill in the county of Cumberland, which had been let by the plaintiff to the defendants by agreements in writing dated respectively November 9, 1918, and September 13, 1919, on yearly tenancies from February 2, 1920. On January 31, 1923, the defendants had given notice to quit expiring on February 2, 1924, but when that date arrived they refused to give up possession. The writ was issued on February 13, 1924.

The defendants pleaded (1.) that they were in possession, and (2.) that the notice to quit had been waived. They further objected that the plaintiff's claim related to a question or difference between the landlord and the tenant of an agricultural holding, arising out of the termination of the tenancy of the said holding, and that it was therefore barred by s. 16 of the Agricultural Holdings Act, 1923. (1)

On March 11, 1924, the defendants issued a summons in

(1) Agricultural Holdings Act, 1923, s. 16, sub-s. 1: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

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the Carlisle District Registry for an order that the action should be stayed or dismissed. The District Registrar refused to make the order, being of opinion that the claim did not relate to a question or difference arising out of the termination of the tenancy and that consequently the action was not barred by s. 16 of the Act.

The defendants appealed, and on March 28 Talbot J. dismissed the appeal, but gave leave to appeal to this Court.

The defendants appealed.

Foà for the appellants. The learned judge was wrong in refusing to stay or dismiss this action. It was the intention of the Legislature in passing s. 16 of the Act of 1923 that all disputes between the landlord and the tenant of an agricultural holding should be withdrawn from the Courts of law and referred to arbitration. This is the true inference to be drawn from the history of the legislation beginning with s. 8 of the Agricultural Holdings (England) Act, 1883 (1), by which claims for compensation only were referred, and continuing through s. 2 of the Act of 1900 (2), s. 1 of the Act of 1906 (3), and s. 13 of the consolidating Act of 1908 (4), to increase the volume of disputes and differences referred to arbitration, until by s. 18 of the Agriculture Act, 1920 (5), it included, as it does under s. 16 of the Agricultural Holdings Act, 1923, after mentioning various claims for compensation and the like, any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy. In construing an Act of Parliament, or any other instrument, the rule is to give the instrument its literal import unless there is something in the subject or context which shows that the literal import cannot be the meaning of the words: *Lowther* v. *Bentinck* (6) per Jessel M.R. In substance the

(1) 46 & 47 Vict. c. 61.
(2) 63 & 64 Vict. c. 50.
(3) 6 Edw. 7, c. 56.
(4) 8 Edw. 7, c. 28.
(5) 10 & 11 Geo. 5, c. 76.
(6) (1874) L. R. 19 Eq. 166, 169.

dispute or difference in this case is a claim for a breach of contract arising out of the termination of the tenancy.

[He also cited *In re Perrett and Bennett-Stanford's Arbitration.* (1)]

W. Allen for the respondent was not called upon.

BANKES L.J. In my opinion, this is a plain case. There is no provision in s. 16 covering this dispute. We have been referred to the earlier statutes, but they throw no real light on the meaning of s. 16. That section deals with two classes of differences, which are to be referred to arbitration, differences arising out of claims by a tenant against a landlord and differences arising out of claims by a landlord against a tenant. Claims by the tenant do not concern us now, and the only question is whether this dispute comes within those differences arising out of claims by a landlord which by the terms of the section are referred to arbitration. Those are differences "arising out of any claim by the landlord against the tenant for waste wrongfully committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding." This last clause was not at first relied on, and that is not to be wondered at, because it cannot be said that a claim in ejectment is a claim for any breach of contract or otherwise in respect of the holding; those words refer to a different class of claims altogether. The words really relied on are "or any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding." Those words describe differences where it is not disputed that the tenancy has determined, and have no application where the question at issue is whether the tenancy has determined or not. Here the whole question is whether the tenancy has determined, and the case is not within the language of the section. There seems to be no reason why the Legislature should preclude a landlord from recourse to the Court to recover a tenement when the tenancy

(1) [1922] 2 K. B. 592.

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has expired or why he should be compelled to regain his property through the inconvenient means of an award. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The only issue between the parties is whether the appellant's tenancy under the respondent has been duly determined by notice to quit or whether it is still subsisting. The tenant, who insists that it has not been determined, claims that the action must be stayed because of s. 16 of the Agricultural Holdings Act, 1923, in order that this issue may be referred to arbitration. Sect. 16 divides those differences which are to be referred under five categories: (1.) Any question or difference arising out of any claim by the tenant against the landlord for compensation or for any sums claimed from the landlord for any breach of contract or otherwise in respect of the holding; (2.) any question or difference arising out of any claim by the landlord against the tenant for waste, or any breach of contract or otherwise in respect of the holding. These are claims of the same nature as the claims in the first category; money claims, or claims which can be reduced to money by the arbitrator. But I cannot understand how by any construction the words describing this class can be made to include a claim by a tenant that a tenancy has not been determined and by the landlord that it has. The third category is more general: "Or any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding." I will refer to this class again after mentioning the fourth and fifth classes for the sake of conformity. The fourth category consists of "any question or difference arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy." The fifth category consists of all other questions which under the Act are referred to arbitration. I go back to the third class of cases, which is the one relied on by the appellant: "Any other question . . . . between the landlord and the tenant . . . . arising out of the

termination of the tenancy of the holding." How that can include a case where the whole question is whether the tenancy of the holding has or has not terminated, is more than I can understand.

SCRUTTON L.J. I agree. The appellants, who were tenants, gave the notice to quit. When the notice expired they would not go. When the respondent brought his action for ejectment they pleaded first that the notice to quit had been waived. The effect of waiving a notice to quit was considered in *Freeman* v. *Evans* (1), where this Court, following *Tayleur* v. *Wildin* (2), and declining to follow *Lord Inchiquin* v. *Lyons* (3), held that the effect was not to revive the old tenancy, which was terminated once and for all by the notice, but to furnish evidence from which a new tenancy may be inferred. Therefore if the appellants had established this plea they would not at the date of the writ have been holding under the original tenancies at all.

Sect. 54 provides that except as in the Act expressed "nothing" therein "shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract. . . . ." Therefore it saves the right of a landlord to bring an action of ejectment unless there is an express enactment excluding the right. Is s. 16 such an enactment? It is the successor of a series of sections which since 1883 have enlarged the class of disputes referred to arbitration. It is found among a number of sections relating to claims for compensation and much of its language is taken word for word from the previous Acts. During the argument I asked Mr. Foà whether the landlord's right to bring an action for ejectment was excluded by s. 2, sub-s. 3, of the Act of 1900. He answered that it was; but I think he answered more from necessity than from conviction. In my opinion, s. 16 of the Act of 1923 does not include a

(1) [1922] 1 Ch. 36. (2) (1868) L. R. 3 Ex. 303.
(3) (1887) 20 L. R. Ir. 474.

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question or difference between a landlord who claims the holding on the ground that the tenancy has expired and a tenant who does not claim under the original agreement, but under a new tenancy, the existence of which the landlord denies. The section deals first with claims by a tenant for compensation; then with sums claimed by the tenant for breach of contract or otherwise in respect of the holding; then with claims by the landlord for waste, or breaches of contract or otherwise in respect of the holding; and then with "any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy. . . . ." I cannot think that those words cover the question whether a new tenancy has been created, for that question does not arise out of the termination of the original tenancy, but is independent of it. If so the section does not contain express words barring the respondent from his claim to bring ejectment, a right which, if not otherwise expressly excluded, has been reserved by s. 54. Personally I am not convinced that s. 16, sub-s. 1, intended to express more than that the matters thereby referred to arbitration should be heard before a single arbitrator.

Appeal dismissed.

Solicitors for appellants: *Clifford Turner & Hopton, for C. W. Allan Hodgson, Carlisle.*

Solicitors for respondent: *Maples, Teesdale & Co., for Saul & Lightfoot, Carlisle.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1924
April 30.

In re BJORNSTAD AND ANOTHER AND THE OUSE SHIPPING COMPANY, LIMITED.

Arbitration—Single Arbitrator—Notice and Refusal to appoint—Application to Court—Foreign Applicant—Discretion—Security for Costs—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 5.

On an application under s. 5 of the Arbitration Act, 1889, to appoint an arbitrator the Court has a discretion and may in a proper case refuse to make an appointment except upon terms.

A contract between British shipbuilders and foreign shipowners for the building and purchase of certain ships contained a clause referring disputes and differences to the decision of a single arbitrator in accordance with the Arbitration Act. Disputes having arisen the foreign firm duly gave notice to the British shipbuilders to appoint an arbitrator, and, on their refusal to do so, applied to the Court under s. 5 of the Act to appoint an arbitrator. The judge in chambers having made an appointment,

The Court, on appeal by the shipbuilders, ordered that, if within a specified time the foreign firm gave security for the costs of the arbitration and of the appeal, the order under appeal should stand, but that otherwise it should be discharged.

In re Eyre and Leicester Corporation [1892] 1 Q. B. 136 distinguished.

APPEAL from an order of Talbot J. in chambers.

By an agreement in writing dated October 31, 1919, between the Ouse Shipping Company, Ld., therein called the builders, of the one part and Messrs. Bjornstad and Braekhus of Bergen, Norway, therein called the purchasers, of the other part, it was agreed as follows :—

1. The builders, provided the purchasers should duly make the payments at the times specified and subject to the provisions contained in the agreement, agreed to build, launch, complete, and sell, and the purchasers agreed to purchase a steel single-decked vessel identified by a particular number in the builders' yard with engines, boilers, machinery, outfit and equipment of specified dimensions and power and in all other respects according to specifications identified as before and signed by the parties and according to plans agreed upon; and they agreed on or after completion to obtain and deliver to the purchasers a certificate of classification in the Norske Veritas highest class.

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2. The purchasers agreed to pay in cash as the purchase money the sum of 98,000*l.* by one sum of 12,250*l.* on the signing of the agreement and five instalments of 17,150*l.* at different periods as the work progressed.

3. The vessel was to be built under the survey of the purchasers and under the superintendence of the purchasers' engineer or surveyor. The quality of the materials used was to be subject to the approval of the classification surveyors, and all imperfect and unsound material or workmanship rejected by them was to be replaced before delivery of the vessel to the purchasers; but after delivery all responsibility on the part of the builders was to cease with regard to all matters, whether of material, workmanship, or otherwise or whether arising before or after delivery save and except the guarantee of the engines and boilers thereinafter provided for.

Clause 15 of the agreement was as follows: "In case any dispute or difference shall arise in respect of any matter or thing contained in the specifications, or drawings or as to the quality of material or workmanship or as to the vessel's trial trip or as to speed or carrying capacity, or as to the length of time the delivery of the vessel has been delayed through any of the causes hereinbefore set forth, or as to any alterations or extras, the same shall be referred to arbitration pursuant to the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force."

By cl. 16 the agreement was to be construed and to take effect as a contract made in England and in accordance with the laws of England, and the purchasers submitted to the jurisdiction of the High Court of Justice in England.

Three other agreements in similar terms were also entered into by the same parties for the building and sale and purchase of three other vessels.

By an agreement in writing dated April 18, 1921, supplemental to the four principal agreements above mentioned, it was agreed amongst other things that the price of the vessels should be reduced; that the last instalment in respect of

each vessel should be paid by an approved six months' bill, and that the builders should be at liberty to reduce the cost of production, construction, and completion consistently with the efficiency and seaworthiness of the vessels.

Clause 4 of the supplemental agreement was as follows: "The buyers shall and they do hereby relinquish any claims which they have or consider they may have against the builders with regard to any alleged delay in the delivery of the said ships or otherwise under the principal agreements all which claims the builders repudiate but it is hereby recorded that any such claims are hereby finally relinquished."

By cl. 6 the provisions of the principal agreements were to remain in force subject to the variation effected by the supplemental agreement.

The four vessels were completed by the builders and delivered to the purchasers after the date of the supplemental agreement. The purchasers alleged that by the terms of the principal agreements the deadweight capacity of each of the vessels was to be not less than 2500 tons and that it was less than this. The builders denied the existence of any contract that the deadweight capacity should be as the purchasers claimed.

On January 25, 1924, the purchasers gave the builders written notice to concur within seven days in the appointment of an arbitrator under the submission to arbitration contained in cl. 15 of the principal agreements. The builders refused to concur in the appointment. Besides denying that there was any such agreement relating to deadweight as the purchasers alleged, they contended that in view of cl. 4 of the supplemental agreement there was no dispute or difference between the parties.

On February 22, 1924, an originating summons was taken out on behalf of Richard Bjornstad and Sigurd Alfred Braekhus for an order under s. 5 of the Arbitration Act, 1889 (1), that an arbitrator might be appointed under the

(1) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far

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submission to arbitration contained in the agreement of October 31, 1919. On February 28 the builders applied to the Master in chambers to set aside the originating summons on the ground that the purchasers were foreigners not carrying on business within the jurisdiction. This application was supported by affidavits stating that Richard Bjornstad had been made a bankrupt or was otherwise unable to pay his debts and that Messrs. Bjornstad and Braekhus had ceased to carry on business as a firm at Bergen.

On March 12 the Master made an order on the originating summons appointing D. C. Leck K.C. as arbitrator. The builders appealed, and applied for an order that the purchasers should give security for costs.

Talbot J. dismissed the appeal, but gave leave to appeal to this Court.

The builders appealed.

Clement Davies for the appellants. The respondents are foreigners out of the jurisdiction of the Court. If they were bringing an action they would as a matter of course be ordered to give security for costs. They are asking the Court to appoint an arbitrator in order that they may reap the benefit of proceedings in this country just as they would by means of an action. Equally then they ought to be ordered to find security for the costs of the arbitration. An arbitrator has no power to order security to be given:

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as they are applicable to the reference under the submission."

"THE FIRST SCHEDULE.

Provisions to be implied in Submissions.

(*a*) If no other mode of reference is provided, the reference shall be to a single arbitrator."

s. 5: "In any of the following cases:—

(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator. . . .

any party may serve the other parties . . . . with a written notice to appoint an arbitrator. . . .

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator . . . . who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

In re Unione Stearinerie Lanza and Wiener. (1) Therefore the Court should refuse to appoint an arbitrator until the necessary security is found. The Court has a discretion under s. 5. The words are "the Court or a judge may on application . . . . appoint an arbitrator," which clearly import a discretion. It is contended that under s. 5 the Court has no discretion and *In re Eyre and Leicester Corporation* (2) is cited in support of that contention. But that case was decided between parties both of whom were British subjects, and there was no reason why either should be released from his contract to go to arbitration. In those circumstances the Court really had no option but to hold the parties bound by their contract and to appoint the arbitrator. In the present case the Court ought to exercise its discretion by refusing to appoint unless within a reasonable time security is given.

Le Quesne for the respondents. These parties have agreed to go to arbitration. The appellants knew when they made the contracts that the respondents were foreigners. They made the contracts with their eyes open. Therefore this case does not differ materially from *In re Eyre and Leicester Corporation.* (2) In that case Kay L.J. held that in such circumstances the duty of this Court was only ministerial. It will not aid one of the parties to repudiate his obligation. No doubt the Court has a discretion to hear and determine a matter although the parties concerned have agreed to submit it to arbitration; but the proper method of invoking the exercise of this discretion is by an application under s. 4 of the Act to stay an action after it has been commenced. Moreover, if the Court has a discretion, an order for security for costs is not a term which it will impose as a condition of appointing an arbitrator. The Court will not in an arbitration order security for costs. *In re Shaw and Ronaldson* (3) is a decision that an arbitration is not "a cause or matter" within the meaning of Order XXXV., r. 5, and that therefore the Court cannot in an arbitration order the examination of witnesses on commission. Order LXV., r. 6,

(1) [1917] 2 K. B. 558. (2) [1892] 1 Q. B. 136.
(3) [1892] 1 Q. B. 91.

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only contemplates security for costs being ordered in a "cause or matter," and therefore not in an arbitration. Order XXXI., rr. 27 and 27A, are to the same effect.

Clement Davies in reply cited *In re Colman and Watson.* (1)

BANKES L.J. This appeal raises an important point. The respondents are a Norwegian firm and the appellants are a shipbuilding company in this country. In 1919 they entered into agreements for the building of a number of ships by the appellants for the respondents. The contracts contained each an arbitration clause referring disputes to the decision of a single arbitrator according to the provisions of the Arbitration Act, 1889. Disputes have arisen with regard to the carrying capacity of the ships built under the contracts, and the respondents have given notice to the appellants to appoint an arbitrator. The appellants have refused to appoint, and the respondents have by originating summons applied to the Court to appoint an arbitrator under s. 5 of the Act, all the conditions precedent specified in the section having been complied with.

The language of s. 5, apart from judicial decision, would clearly indicate that the Court has a discretion whether it should or should not make the appointment. The words are: "the Court or a judge may, on application by the party who gave the notice, appoint." The similar words in s. 4 "the Court or a judge thereof . . . . may make an order staying the proceedings" beyond all doubt confer a discretion on the Court. But counsel for the respondents has relied on *In re Eyre and Leicester Corporation* (2) as a decision of this Court that the word "may" in s. 5 is in all cases to be read as "must," and consequently that the Court when called upon to act under that section has no discretion at all, but must appoint an arbitrator as soon as it is proved that the conditions of the section have been complied with. If that was the decision of the Court I should loyally follow it. But in truth it does not cover this case; for there both the parties were resident in this country and the fact that the

(1) [1908] 1 K. B. 47. (2) [1892] 1 Q. B. 136.

party applying was a foreigner out of the jurisdiction had not to be considered by the Court. It may be that the words of Lopes L.J. without explanation would seem to cover every case; but the judgments of Lord Esher M.R. and Kay L.J. show that they intended to confine the decision to the facts of that case, and there is nothing to show any reference to the exceptional feature of a foreigner out of the jurisdiction seeking the assistance of the Court. I would cite the words of Lord Esher M.R. He said (1): "In this case it is admitted, and the Court is satisfied that there is a dispute within the submission. Therefore the case stands thus: the parties have agreed with regard to certain matters to substitute arbitration by a single arbitrator for a trial in Court; it is admitted that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; and there has been a proper notice given which has not been complied with. What under these circumstances does the section provide that the Court is to do? It says that the Court 'may' appoint an arbitrator. It is argued that under this provision the Court may say in this case, where it is admitted and the Court has decided that there is a dispute within the submission, that it will not force the corporation to go to arbitration, but will leave the contractor to bring an action—that is, that the Court has a discretion to say in such a case that, though one side has contracted to refer the matter to arbitration, they need not act according to their contract, and that the Court will relieve them from it, and the other side must bring their action. I do not think that that is so. I think that in such a case as this 'may' means 'must,' and that the Court is bound to appoint an arbitrator." Those words, and especially the last, justify the Court in saying that the Master of the Rolls intended to confine his decision to the particular facts of the case before him. The judgment of Lopes L.J. may seem to cover wider ground, but it again ought not to be read as applicable to cases which he was not considering. He says: "In a case like the present," where all conditions precedent have

(1) [1892] 1 Q. B. 142.

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been fulfilled, "the word 'may' is equivalent to 'must'"; that is to say when there is no reason beyond disinclination why the party in default should not perform his contract and concur in appointing an arbitrator. The words of Kay L.J. throw a great light on the decision of the Court. He said (1): "I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case, I do not think that the Court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the Court ought to exercise any discretion, if it has any; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case the word 'may' must be treated as equivalent to 'must.' But I do not wish to hold that in every case 'may' in this section is equivalent to 'must.'" The Lord Justice there explains the words used by the other members of the Court when he says: "In such a case I do not think the Court ought to exercise any discretion, if it has any; its duty under such circumstances becomes only ministerial," and therefore agrees that "for the purposes of this case" the word "may" must be treated as "must"; but declines to hold that "in every case 'may' in this section is equivalent to 'must.'" In my view the decision in that case does not bind us in this case, where the persons invoking the assistance of the Court are foreigners outside the jurisdiction of the Court. No doubt the power of the Court as recognized by Order LXV., r. 6, is a power to order security for costs "in any cause or matter," and it may be that we have no power to make an order in an arbitration directly affecting the costs of that arbitration; but if we have a discretion, as I think we have, to appoint or refuse unconditionally to appoint an arbitrator we can impose any reasonable terms as a condition on which

(1) [1892] 1 Q. B. 143.

our discretion shall be exercised in favour of an applicant. Very often where an application is made under s. 4, the fact that there is no power to order evidence to be taken on commission is a ground for refusing to stay an action, and similarly it might in my opinion be a ground for refusing to exercise our discretion under s. 5 that the plaintiff was a foreigner out of the jurisdiction. Therefore I think it is competent to the Court in this case to order that if the respondents within a specified time give security to the satisfaction of a Master for the costs of the arbitration and of this appeal the order appealed from do stand, but that otherwise it shall be discharged. And in my opinion an order to that effect should be made.

WARRINGTON L.J. I am of the same opinion. This is an appeal from an order made under s. 5 of the Arbitration Act, 1889, which provides that in certain circumstances "the Court or a judge may . . . . appoint an arbitrator." So far as the wording of the section is concerned it imports some discretion in the Court or a judge; but it is said that *In re Eyre and Leicester Corporation* (1) has decided that the Court has no discretion under that section. In my opinion the case did not decide that. It did decide that when the conditions specified in the section have been fulfilled, and there are no other facts to influence the discretion of the Court, it ought to be exercised by appointing an arbitrator; it is the duty of the Court to give effect to the contract between the parties where there is no material on which it can refuse to do so. But the judgment of Kay L.J. makes it clear that he had in mind cases other than those enumerated by Lord Esher M.R. and Lopes L.J. in which it would not be beyond the power of the Court to refuse to appoint an arbitrator. The Lord Justice said (2): "I desire . . . . not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to the Court. I conceive that cases might arise where it would be necessary to exercise some discretion."

(1) [1892] 1 Q. B. 136. (2) [1892] 1 Q. B. 143.

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Then he went on to say that in the circumstances of that case the duty of the Court was merely ministerial. In the present case there is a most material fact which was not among the facts in *Eyre's* case (1), the fact that the parties invoking the assistance of the Court are foreigners out of the jurisdiction. That fact brings this case within the class contemplated by Kay L.J. and, notwithstanding the more general expressions of Lopes L.J., as I read the judgments of the other members of the Court, the conclusion I come to is that if that fact had been established in *Eyre's* case (1) the decision would not have been as it was. At any rate I do not think that case decided that the Court had no discretion at all, as was argued by counsel for the respondents.

SCRUTTON L.J. I agree. Two Norwegian subjects made contracts with an English shipbuilding firm for the purchase of four ships. Each of the contracts contained an arbitration clause. The contracts are English contracts, and the Norwegians have provided an agent in England on whom process may be served. They have now dissolved partnership; one of them is impecunious; the other has attached himself to another firm; but the two describing themselves as partners desire to proceed to arbitration on the contract in this country. The shipbuilders refuse to appoint any arbitrator, and the Norwegians apply to the Court to appoint an arbitrator under s. 5 of the Arbitration Act, 1889. It is objected that they are foreigners out of the jurisdiction of the Court. They reply that whether that is so or not the Court must appoint an arbitrator.

There is no justification for this attitude. The Courts of this country do not offer their assistance as of right to foreigners, but only upon the condition that the foreigners shall afford adequate protection to the persons against whom they are minded to proceed. The property of foreign sovereigns is not liable to be seized when the foreign sovereign is a defendant. That was decided in *The Parlement Belge*. (2) But a foreign sovereign suing as plaintiff must

(1) [1892] 1 Q. B. 136. (2) (1880) 5 P. D. 197.

give security. "When a Government comes in as a suitor," said Cotton L.J. in *The Newbattle* (1), "it submits to the jurisdiction of the Court and to all orders which may properly be made." In that case the foreign sovereign was not allowed to proceed with his action until he had given security to answer the defendant's counterclaim. The principle of that case covers the present. The respondents are invoking the assistance of the Court. They admit through their counsel that if they had issued a writ and the other side had applied under s. 4 of the Arbitration Act to stay the action, the Court might refuse to give effect to the submission to arbitration; but they insist that as they are applying for the appointment of an arbitrator under s. 5 the Court has no power to stay them even for the time necessary for them to find security for the protection of the other side. That seems at first sight contrary to common sense, but the respondents say that the law has been so laid down by the Court of Appeal in *In re Eyre and Leicester Corporation.* (2) If it had, I should follow it; but I cannot find in that case any trace of a decision that the Court is bound to act on the application of a foreign subject without making him give security. In making an application under s. 5 a foreigner is subject to that same obligation to give security to which he is subject when instituting any other proceeding, and I am not bound to apply the decision in *Eyre's* case (2) to a different set of circumstances the merits of which were not in the mind of the Court. If we may refuse to appoint an arbitrator, we may also refuse to do it unless the applicant is prepared to submit to the condition that he shall give security. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for respondents: *Botterell & Roche, for Sanderson & Co., Hull.*

(1) (1885) 10 P. D. 33, 35.

(2) [1892] 1 Q. B. 136.

W. H. G.

1924
May 6.

ABBOTT *v.* BROMLEY.

Coal Mine—Disused Workings—Precautions prescribed by Statute—Omission to observe—Examination of disused Workings—Sufficiency—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 68.

The provision in s. 68 of the Coal Mines Act, 1911, that where a working has approached within forty yards of "disused workings (not being workings which have been examined and found to be free from accumulations of water or other liquid matter)" certain precautions in relation to the provision of boreholes shall be observed, means that it must be found as a matter of fact, and not merely as a probability, that the disused workings have been examined and found to be free from such accumulations. If the workings cannot be so examined, the precautions prescribed by the section must be observed.

Per Shearman J.: The examination contemplated by the section is a visual or physical examination. An examination by scientific tests is not such an examination as will dispense with the observance of the precautions.

CASE stated by justices of Staffordshire.

On October 4, 1923, an information was laid by Henry Arnold Abbott, one of His Majesty's inspectors of mines (hereinafter called "the appellant"), against Oliver Johnson Bromley (hereinafter called "the respondent"), charging that he on April 25, 1923, then being the agent of a certain mine, known as the Apedale Footrail Colliery, did in a working that had approached within forty yards of disused workings (not being workings which had been examined and found to be free from accumulations of water or other liquid matter) unlawfully fail constantly to keep extending to a sufficient distance, not being less than five yards, in advance, at least one borehole near the centre of the working and sufficient flank boreholes on each side at intervals of not more than five yards, as required by s. 68 of the Coal Mines Act, 1911.

The justices dismissed the information.

The following facts were proved:—

(*a*) The respondent was at the time of the matters complained of the agent of the Apedale Footrail Colliery, being a mine within the meaning of the Coal Mines Act, 1911.

(*b*) The management of the Apedale Footrail Colliery was in April, 1922, desirous of connecting the Apedale Colliery workings with certain adjacent workings known as the Lily Pit workings, which workings had been disused and abandoned for about thirty years.

(*c*) To effect the aforesaid object the management of the Apedale Footrail Colliery caused a working to be commenced from the Apedale Footrail Colliery in the direction of the disused workings. The said working was approaching the disused workings on a rising gradient of 1 in $1\frac{3}{4}$, and was known as "Russell's Dip."

(*d*) In or about July, 1922, the management caused six boreholes to be drilled in the face of Russell's Dip in the direction of the disused workings.

(*e*) In September, 1922, one only—namely, the sixth of the said boreholes—after it had been driven thirty-three yards, tapped water; the borehole was $2\frac{1}{4}$ inches in diameter. It was then driven two feet further into open space, and on September 22, 1922, a full head of water came through the borehole, and work at the heading was abandoned until April, 1923. Water continued to run at full bore until November, 1922, and then from half to three-quarter bore until January, 1923. In January it again ran for a time at full bore, and in February, 1923, had decreased to an amount between half and three-quarter bore, and the working faces went dry. This latter state of things continued until April 25, 1923. Working in Russell's Dip was recommenced on April 9, 1923. From April 9 to 25, 1923, no further borehole was drilled in or near Russell's Dip either in the face or in the flank thereof. From February to April 25, 1923, the face of the coal was dry. The nature of the coal and cannel was such that, if an accumulation of water or other liquid were behind it, the face of the coal would be wet. The inference drawn

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by the management therefrom was that the borehole had drawn off any accumulation of water or other liquid matter that had existed in the disused workings, and that the disused workings were free from any accumulation of water or other liquid matter, and that such water as was still running through the borehole was due to the normal passage of surface water through the mine. This inference the justices found to be a fair and reasonable inference.

(*f*) The other five boreholes had tapped no water.

(*g*) On April 25, 1923, when the working had approached to within about three feet from the disused workings, a quantity of water or other liquid matter entered into Russell's Dip from the direction of the disused workings, causing the death of eight miners at work at the time. Examination by a borehole was the only practicable method by which the management could examine the disused workings. Actual physical and/or visual examination of disused workings is sometimes, though rarely, practicable. In the case under consideration it was agreed not to be practicable. The apparatus used was the Burnside apparatus, and was the most approved boring apparatus.

It was contended for the appellant that as a matter of law the disused workings had not been "examined and found to be free from accumulations of water or other liquid matter" within the meaning of s. 68. It was contended for the respondent that they had.

The justices found and held that the disused workings had been examined and found to be free from accumulations of water or other liquid matter, and that therefore the provisions of s. 68 of the Act of 1911 did not apply. (1)

(1) Coal Mines Act, 1911, s. 68: "Where any working has approached within forty yards of a place containing or likely to contain an accumulation of water or other liquid matter, or of disused workings (not being workings which have been examined and found to be free from accumulations of water or other liquid matter) the working shall not exceed eight feet in width, and there shall be constantly kept extending

Edgar Dale (*Giveen* with him) for the appellant.

Sir Henry Maddocks K.C. and *H. H. Joy K.C.* for the respondent.

The arguments sufficiently appear from the judgments.

LORD HEWART C.J. read the information and continued: The justices dismissed the information because they came to the conclusion that the disused workings which were referred to had been examined and found to be free from accumulations of water or other liquid matter.

In those circumstances the question for the opinion of this Court is whether the justices were wrong in law in holding that no breach of the section had been committed. It may be convenient to read once more the very words of this important section in this most important Act of Parliament, which, as was said in this Court the other day, is the charter of men who work underground in coal mines. [His Lordship read s. 68 and continued:] To deal only with that part of the section which has to do with workings that approach disused workings, it is quite obvious that the Legislature clearly contemplates that there may be disused workings which it is not possible effectively to examine so as to arrive, with scientific accuracy, at a certain conclusion that those workings are free from accumulations of water or other liquid matter. This statute does not compel, any more than other statutes compel, persons to perform impossibilities. But it does say that unless the disused workings can be and have been examined, and the result of the examination is to show with certainty that those disused workings are free from accumulations of water, then certain precautions must be taken. To put the matter in another way, the precautions which are prescribed by this section are not to be omitted where the working is approaching a disused working unless three conditions are fulfilled—that is to say, unless (1.) the disused working is of such a

to a sufficient distance, not being less than five yards, in advance, at least one borehole near the centre of the working, and sufficient flank boreholes on each side at intervals of not more than five yards."

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kind that it can be fully and properly examined, and (2.) it has been fully and properly examined, and (3.) the result of that examination is to establish not as a matter of probability but as a matter of undoubted fact that the workings are free from accumulations of water or other liquid matter.

Now, that being the section, what are the facts which the justices in this case have found? They have found that the respondent was at the material time the agent of the colliery. They have found that the management of the colliery about the month of April, 1922, decided to connect the colliery workings with certain adjacent workings known as the Lily Pit Workings, which workings had been disused and abandoned for about thirty years. Those are the disused workings with which the case has to do. In order to effect their purpose the management of the colliery caused a working to be commenced from the Apedale Footrail Colliery in the direction of the disused workings. That new working was approaching the disused workings on a rising gradient of 1 in $1\frac{3}{4}$; and about July, 1922, the management caused six boreholes to be drilled in the face of that working in the direction of the disused workings. From that time forward the chronology of the case is as follows: In July, 1922, six boreholes were drilled in the face of the new working. In September, 1922, one of those boreholes—namely, the sixth—was driven thirty-three yards on and tapped water. That borehole was of a diameter of $2\frac{1}{4}$ inches. It was then driven two feet further on, and on September 22, 1922, a full head of water came through. A full head of water continued to come through during the whole of October and up to some date in November, 1922. At some date (not stated) in November, 1922, the full head diminished, so that water to the extent of half to three-quarters of the bore came through, and that condition continued to the end of November, during the whole of December, 1922, and to some period (not stated) in January, 1923. In January, 1923, a full bore again resumed, and that full bore was diminished at some date (not stated) in

February, 1923, to half to three-quarters of the bore; and at the material time, after those antecedents, water was still coming through that borehole to the extent of a half to three-quarters of its diameter. In that state of the facts the work was continued without the taking of any of the precautions prescribed in s. 68. The work was continued upon the footing that because of those facts the disused workings had been examined and found to be free from accumulations of water, and on April 25, 1923, a few days after—in fact, I think upon the very day upon which the working was resumed—when the working had approached to within about three feet of the disused workings, a quantity of water or other liquid matter entered into the new working from the direction of the disused workings and caused the death of eight miners at work at the time.

That being so, a prosecution was instituted under the provisions of s. 68, and it was said on the part of the defendant, the present respondent, that s. 68 did not apply—that the precautions mentioned in it were not requisite, inasmuch as at the material time these disused workings had been examined and found to be free from accumulations of water or other liquid matter. Now what is it that the justices say? They say that examination by means of a borehole was the only practicable method by which the management could examine those disused workings. They say that actual physical or visual examination of disused workings is sometimes, but rarely, practicable; that in this case it was not practicable, and that the apparatus used for boring was the most approved boring apparatus. Nevertheless, the appellant contended that as a matter of law the disused workings had not been examined and found to be free from accumulations of water or other liquid matter within the meaning of the section.

As I have said, the question was not whether the respondent should do or should be blamed for omitting to do something which it was a physical impossibility for him to do. The question was whether there was any evidence, in those circumstances, upon which the justices could properly come to

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the conclusion that at the material time the disused workings had been examined and found to be free from accumulations of water or other liquid matter. It may be, as I have said, that there are some disused workings which cannot be adequately, efficiently and completely examined beforehand. But if that be so, then nobody can say with a pretence at scientific truth that they have been examined and found to be free from water. In such a case as that the manifest statutory duty is to observe the precautions which the statute prescribes.

But it is said that here upon this evidence it was open to the justices to find that these disused workings had been examined and found within the meaning of this section to be "free from accumulations of water or other liquid matter." Speaking for myself, I refrain from expressing an opinion which would attempt the form of a definition of the term "examined." It may well be that circumstances alter cases, and that what may be an efficient examination in one case may not be an efficient examination in another case. But solvitur ambulando—the proof of the pudding is in the eating—and the examination is of no avail to the defendants upon such a prosecution unless it can be shown that as a result of an efficient examination a certain result was found as a truth and as a fact, not as a probability. So far as this evidence is concerned, it is quite clear that an examination of a sort was made. It is quite clear that a sort of conclusion was arrived at. Whether a better examination could have been made or not I do not know. But that a conclusion of scientific accuracy was not and could not be arrived at is, to my mind, obvious; and that being so the only possible course for the respondent was to observe the precautions contained in the section. The condition had not been fulfilled which would permit lawfully the omission of those precautions. I am not going to express an opinion as to the exact value of that which was found. Personally I should have thought that what was found rather went to show that there was an accumulation of water. But however that may be, certain I am of this, that there were no materials here, whatever

view was taken of the examination, which justified the magistrates in saying that these disused workings had been found to be at the material time free from accumulations of water or other liquid matter. I forbear to enter, in the present state of one's information, upon questions to which this case does not give rise. But upon the question of law contained in this case, whether the justices were right in holding that the disused workings had not only been examined but had also been found to be free from accumulations of water or other liquid matter, I am clearly of opinion that the justices were wrong, and that this appeal should be allowed.

SHEARMAN J. I am of the same opinion. This is an appeal by an inspector of mines against the agent of a colliery called the Apedale Footrail Colliery. The management were minded about July, 1922, to work within forty yards of a disused working, and thereupon the question arose what they should do under s. 68 of the Coal Mines Act, 1911. That provides that where any working has approached within forty yards of a disused working, and then come these words in brackets, "not being workings which have been examined and found to be free from accumulations of water or other liquid matter," certain provisions as to boreholes are prescribed and made obligatory. The summons was taken out against the agent for not complying with the requirements of that section; and the question came before the magistrates. The agent's answer was, that although they were working within forty yards of a disused working, this particular working was one which had been examined and found to be free from accumulations of water. Now this is a very well stated case, and one is always pleased to find a very well stated case; one approaches all these cases from one standpoint. The magistrates hear the witnesses in person, and all we hear is a short résumé of the facts and the magistrates' findings; and very often the counsel who opens the case, and opens it very plausibly, tries to convey the impression, and does convey the impression (particularly if he alludes to one or two small things which

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are not in the case at all, but which are accurately stated elsewhere), that the magistrates have arrived at an absurd conclusion. I am never inclined to listen to such arguments. I am satisfied that the magistrates very seldom arrive at absurd conclusions, and all we have to consider is, they having heard the examination and cross-examination of the witnesses who were present and who gave evidence, whether there was any evidence upon which they could arrive at their conclusion; if there was, we cannot interfere with it. We can only interfere with it if they have misdirected themselves by applying a wrong principle of law, by admitting as evidence what was not evidence and was irrelevant to the charge. The details have been given by my Lord, when summing up the evidence, as to the water which did come through from one borehole which was made. Then the magistrates' case goes on to state this: "The inference drawn by the management therefrom was that the borehole"—that is, the one long borehole which had tapped water, and had water running through it for many months—" had drawn off any accumulation of water or other liquid matter that had existed in the disused workings, and that the disused workings were free from any accumulation of water or other liquid matter, and that such water as was still running through the borehole was due to the normal passage of surface water through the mine." Then they went on to say that they found this inference to be " a fair and reasonable inference." They did not find that the fact was true, but that the management reasonably thought that an untrue fact was true at that time. Then they said " the other five boreholes had tapped no water," and then in (*g*): " On April 25, 1923, when the working had approached to within about three feet from the disused workings a quantity of water or other liquid matter entered into 'Russell's Dip.'" Then they say: " Examination by a borehole was the only practicable method by which the management could examine the disused workings. Actual physical and/or visual examination of disused workings is sometimes, though rarely, practicable. In the case under consideration

it was agreed not to be practicable. The apparatus used was the Burnside apparatus, and was the most approved boring apparatus." Then they put the case which we are asked to decide: "It was contended for the appellant that as a matter of law the disused workings had not been examined and found to be free from accumulations of water or other liquid matter within the meaning of the said section. It was contended for the respondent that they had." They then found that the contention of the respondent was correct. In my opinion, there was no evidence on which they could so find. All they have found is that when one boring was made through to within a few inches of these disused workings, scientifically the management quite reasonably formed the opinion that any accumulation of water had gone. I do not think any very good purpose is served by stating that we are not going to say what this statute means, and that we are only going to say what it does not mean. If we only say what it does not mean, that gives no assistance to people who have to interpret the Act afterwards. In my view, what was really contemplated was that it should deal with cases where the disused workings were open to human entrance, and that all the time you are working people can see that there is no water there, and that is why I think that restriction was inserted in the Act of 1911, although it was not in the Coal Mines Regulation Act, 1887. It was not put in to admit matters of scientific inference, but to exclude cases where people could examine and find that there was no water, because I do not think it is possible by an examination, other than visual or physical, to "find"; I know of none which would comply with the statute. The words, "examined and found," must be read together, and, in my judgment, "examined and found" means going over and looking at the whole—I do not mean to say every cranny, but substantially the whole—of the workings and finding that there are no accumulations of water in them owing to their having been disused. In my judgment, the findings of the justices as to why the management dispensed with the statutory requirements are findings that they did in fact

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dispense with them, and, in my opinion, there was no evidence that they had examined and found these old workings to be free from water as examination and finding of freedom from accumulations of water were contemplated by the statute. The result is clear, that if there was no evidence on which they could find that these disused workings came within the exception (and, in my judgment, the proof that they come within the exception rests upon the party charged) the duty of the magistrates was to convict. On those grounds I think this appeal should be allowed.

ROCHE J. I agree. Speaking for myself, I desire to express no opinion as to the method by which the examination referred to in the parenthesis in s. 68 of the Coal Mines Act of 1911 must be conducted or carried out. I base my judgment upon two grounds: first, that the examination must be exploratory of the area in question—that is to say, of the disused workings as a whole. On the facts set out in this case there was no such examination. There was, in my opinion, no evidence to justify a finding of a sufficient examination. Secondly, on the facts as set out in the case, the workings were not found to be "free from accumulations of water." On the contrary, accumulations of water were found to exist. Thereafter inferences were drawn that the accumulations had been exhausted before the accident took place. That those inferences were mistaken is not the point. The point is that the statute does not allow inferences of that kind to dispense the management of a coal mine from the use of boreholes in the circumstances set out in the special case.

Appeal allowed.

Solicitor for appellant: *The Solicitor to the Treasury.*

Solicitors for the respondent: *Cunliffe, Blake & Mossman.*

F. C.

[IN THE COURT OF APPEAL.]

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May 14, 15, 19, 20; *June* 23.

THE KING *v.* ROBERTS.

Ex parte SCURR AND OTHERS.

Local Government—Metropolitan Borough Council—Excessive Payments to Employees—Disallowance by District Auditor of Excess—Discretion of Council — Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 62—*Jurisdiction of Auditor — "Item of account contrary to law" — Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 247, *sub-s.* 7.

By s. 247, sub-s. 7, of the Public Health Act, 1875: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment":—

Held, that that provision applies as well to excessive payments made for lawful objects as to payments made for unlawful objects.

By s. 62 of the Metropolis Management Act, 1855, a metropolitan borough council "shall . . . . employ . . . . such . . . . servants as may be necessary, and may allow to such . . . . servants . . . . such wages as (the council) may think fit."

A metropolitan borough council was of opinion that it ought not, as a model employer, to pay any of its servants less than 4*l.* a week, and it accordingly paid the various classes of its servants scales of wages based upon that principle. The wages so paid were considerably in excess of the rates fixed by awards of the Joint Industrial Council, and also of the pre-war rates of wages coupled with the officially recognized increase in the cost of living, but the council in making the payments acted in good faith. The district auditor disallowed the excess above what he considered would have been a reasonable payment:—

Held, by Scrutton and Atkin L.JJ. (Bankes L.J. dissenting), that the auditor was not justified in making the disallowance.

By Scrutton L.J. On the ground that Parliament had given the council, an elected representative body, a very wide discretion, and that the payments in question did not exceed the reasonable limits of that discretion. He was of opinion, however, that if the payments had exceeded those limits they would not have been protected by the fact that the council in making them had acted in good faith.

By Atkin L.J. On the ground that the council had under s. 62 of the Act of 1855 an unlimited discretion subject to the condition that it must exercise it in good faith.

Judgment of Divisional Court [1924] 1 K. B. 514 reversed.

APPEAL from a Divisional Court (1) discharging a rule for a certiorari.

The respondent, who is one of the district auditors of the

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Ministry of Health, in the course of his audit of the accounts of the borough council of Poplar for the year 1921–22 found that the council had paid to its employees wages at rates which in his opinion were unreasonable and exorbitant, and he disallowed in respect of such payments and surcharged upon the councillors authorizing them a sum of 5000*l.* (1) The councillors so surcharged obtained a rule nisi for a certiorari to quash the auditor's certificate of disallowance and surcharge upon the ground, amongst others, that the surcharge was an improper limitation of the discretion vested in the council under s. 62 of the Metropolis Management Act, 1855. (2)

The following statement of the facts is taken from the judgment of the Divisional Court :—

In the year 1914 there were no striking variations between the scales of payment made by the several metropolitan borough councils on account of wages of the several grades of their employees. The wages paid them by the borough of Poplar were not the highest compared with those of the

(1) By s. 247, sub-s. 7, of the Public Health Act, 1875 : " Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made." And by the joint effect of s. 71, sub-s. 3, of the Local Government Act, 1888, and s. 14 of the London Government Act, 1899 (62 & 63 Vict. c. 14), the accounts of a metropolitan borough council are to be audited by district auditors in like manner as the accounts of an urban authority under the above section.

(2) By s. 62 of the Metropolis Management Act, 1855: ". . . . The Board of Works for every district under this Act," including the Poplar district, "shall respectively appoint or employ or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit." The Borough Council have now under the London Government Act, 1899, s. 4, the powers and duties of the district boards.

other metropolitan councils, but were somewhat above the average, the minimum wage for the lowest grade of labour being 30*s.* weekly for men and 22*s.* 6*d.* weekly for women. By increases from time to time the minimum wage for similar labour had risen by April 30, 1920, to 64*s.*, and 49*s.* 9*d.* respectively. When auditing the accounts for the year ending March 31, 1921, the auditor found that a marked increase in the wages scales had taken effect from May 1, 1920, and that from that date a minimum wage of 80*s.* per week for men and women of the lowest grade of workers had been maintained. He did not then raise any objection to such increases by reason of the fact that the cost of living had during and subsequent to the Great War greatly increased. At the audit beginning upon January 26, 1923, he found that the above rate of 80*s.* a week was still being maintained, although the cost of living had been materially reduced. He then proceeded to ascertain the rate of wages payable elsewhere in the London area, founding himself upon the agreed rates of the trade union and other awards appropriate to the several groups of employees. He also prepared charts which were exhibited to the affidavit he filed in the case which show: (*a*) The bonus rates paid by the borough of Poplar since April, 1920. (*b*) The bonus rates corresponding to the extra cost of living as shown in the Labour Gazette. (*c*) The bonus rate agreed upon in the awards of the Joint Industrial Council, London district, or of the appropriate trade union.

The Joint Industrial Council, generally known as the Whitley Committee, is a body comprising representatives of employers and employed in equal numbers which was set up to report upon the relations between employers and employees. It is not necessary to go into elaborate detail, but it is sufficient to refer to para. 9 of the auditor's affidavit, which is as follows: "I found (*a*) that the total of the wage payments made by the council in the year 1921–22 exceeded by about 17,000*l.* the total amount of the wages that would have been paid by them if the agreed wages of the awards referred to had been adopted, and that

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the rates of payment were much above those contained in the said awards in the last two months of that year. (*b*) That on a comparison with the weekly wages paid in 1914 increased by a bonus proportionate to the increase in the cost of living, the council's wages payments in 1921–22 showed an excess of over 25,000*l.* (*c*) That the wage increases paid at the end of the year 1921–22 were more than sufficient to compensate this increase in the cost of living by fully 100 per cent. in the case of men of Grade A, 200 per cent. in the case of women of Grade A, 80 per cent. in the case of men of Grade B, 85 per cent. in the case of general labourers. (*d*) That as the working hours per week were considerably shorter in 1921 and 1922 than in 1914, the figures given in (*b*) and (*c*) above would be much greater if the comparison were applied to wages per hour instead of to wages per week, and that the excess of over 25,000*l.* mentioned in (*b*) above would thus be raised to an excess of more than 35,500*l.* (*e*) That in the lower grades the new minimum rate varied from nearly three times to over four times the rate paid per hour in 1914."

With this result before him, he thought it incumbent upon him to consider whether his duty, as laid down by sub-s. 7 of s. 246 of the Public Health Act, 1875, required him to disallow any part of the council's wage payments during the year 1921 or 1922, or to make any surcharge in respect of loss to the rate fund unjustifiably incurred. He thereupon adjourned his audit till May 31, 1923, and gave notice of that fact to those persons who were members of the council during the course of the year to which the audit applied, in order that they might have an opportunity of attending and making such representations as they thought proper. A number of them attended, and the auditor heard what they had to say. It then appeared that the council regarded itself as bound by what it deemed to be a " mandate of the electors," the question of the propriety of the payments having been raised before the electors at two by-elections in November 1922, when candidates supporting the payments were returned unopposed. And Mr. G. Lansbury,

one of the appellant councillors, in his address to the auditor, told him that as the electors had given their verdict his only duty was to them, and that he owed no duty to the large ratepayers who resided outside the borough and consequently had no vote. The auditor then came to a determination which is set out in his affidavit: "On the facts which were in evidence at the audit and on the statements made before me by some of the applicants in this case, I took the view that the council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers whose funds they administered, had imposed unreasonable charges upon those funds, and had made payments which were far in excess of those necessary to obtain the service required and to maintain a high standard of efficiency, and which were thus in reality gifts to their employees in addition to remuneration for their services, and that the persons responsible had thus incurred an unjustifiable waste of the rate fund and had acted arbitrarily and contrary to law. Although I agreed that in May, 1920, the council exercised their statutory power with due care in determining the wages to be paid for the time being to each group of manual workers, I have acted on the view that the maintenance of a minimum wage of 4*l.* a week for unskilled labour after the reason for the increase to this level had to a large extent disappeared, was not a reasonable and legitimate exercise of their statutory power. In particular I formed the opinion that a certain resolution, passed by the council on August 31, 1921, to the effect that no reduction of wage or bonus should be made during the ensuing four months which was subsequently acted upon for twelve months was not a legitimate exercise of the council's power. It disregarded very important reductions which had already taken place in the cost of living and in the trade union and other awards, and during the period of its operation further important reductions were likely to occur and did in fact occur. This resolution and its extended application I regarded as ultra vires of the council. I disallowed payments on account of wages amounting to the

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sum of 5000*l.* in the accounts of the council for the year 1921-22, and for so doing I stated my reasons in my certificate hereinafter referred to. I surcharged the said sum of 5000*l.*" This disallowance and surcharge of 5000*l.* the applicants in this case sought to quash.

The Divisional Court (Lord Hewart C.J., Sankey and Salter JJ.) discharged the rule. The surcharged councillors appealed.

Sir John Simon K.C. and *Croom-Johnson* for the appellants. The auditor had no jurisdiction to deal with the reasonableness of the charges. Under s. 247, sub-s. 7, of the Public Health Act his power to disallow payments is limited to such as are "contrary to law," by which is meant payments for unlawful objects or to persons not entitled to receive them. He has no concern with the quantum, which, under s. 62 of the Metropolis Management Act, 1855, is a matter for the council's discretion. He can only disallow a payment in respect of a lawful object if the amount is so excessive that the decision of the council to make the payment could not have been a bona fide exercise of their discretion, and it is not suggested that there was any want of bona fides on the part of the council in the present case.

Under the Poor Rate Act, 1810 (50 Geo. 3, c. 49), by which the accounts of overseers were to be submitted to justices, there was indeed power to deal with the amount of the payments as well as the illegality, the justices being required in s. 1 not only "to disallow and strike out of every such account all such charges and payments as they shall deem to be unfounded" but also "to reduce such as they shall deem to be exorbitant." Then by s. 47 of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), the overseers were to submit their accounts "to the guardians, auditors, or such other persons as by virtue of any statute or custom, or of the rules orders or regulations" of the Poor Law Commissioners "may be appointed to examine . . . . such accounts." In 1844 in *Reg.* v. *Earl of Dartmouth* (1) it was held that the Act of

(1) (1844) 5 Q. B. 878.

1834 did not take away the authority of the justices under the Act of 1810 to audit the overseers' accounts, and that the justices were entitled to allow items which had already been disallowed by the auditors under the later Act. It was to meet the inconvenience arising from that decision that ss. 32–39 were inserted in the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101). By s. 37 of that Act the power of justices to audit the overseers' accounts was taken away. And by s. 32 the Poor Law Commissioners were empowered to combine parishes into districts for the audit of accounts, and "Every auditor appointed for such a district shall have full powers to examine, audit, allow, or disallow of accounts, and of items therein . . . . and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting." That Act contains no words giving to the district auditors any power to reduce exorbitant charges, such as the Act of 1810 had given to the justices, except in the matter of the taxation of law bills, with reference to which it was provided by s. 39 that "if any such bill be not taxed" by the clerk of the peace of the county "before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final." Except in that one matter the auditors have no jurisdiction to deal with reasonableness of the amount. The auditor has given as one of his reasons for disallowing these payments that they were "largely in excess of those which were needed to obtain the services required." But the council were not bound to buy their labour in the cheapest market any more than they were bound to accept the lowest tender for goods to be supplied: *Rex* v. *Roberts.* (1) It is true that in a circular issued by the Poor Law Commissioners on March 1, 1836, and addressed to churchwardens and overseers (quoted in Burn's Justice, 1869 ed., vol. iv., p. 1105), after referring to the Poor Rate Act, 1810, by which justices were authorized to reduce such charges as they deemed exorbitant, they go on

(1) [1908] 1 K. B. 407.

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to say: "With relation to the exorbitant charges, the general rule is, that all charges are exorbitant (sic) on which the overseers have paid any person for goods or services at a higher rate than such goods or services were offered by any other competent person, or than they might be obtained for by a private individual resident within the same district." But that quotation was prefaced by the statement that "numerous questions formerly arose as to the expenditure properly chargeable by overseers," meaning that the proposition quoted was antiquated and no longer law. Even if the wage payments in the present case exceeded what was reasonable that fact does not make them ultra vires. In *Livingstone* v. *Westminster Corporation* (1) a borough council passed a resolution under s. 120 of the Local Government Act, 1888, assessing the compensation payable to an official on the abolition of his office, based on his salary and emoluments. The auditor disallowed part of the compensation as not representing a proper emolument. The council then rescinded their resolution and voted a reduced sum. In an action by the official for arrears of his allowance based on the original assessment, it was held that the disallowance was wrong and the plaintiff was entitled to succeed, on the ground that even if the council had originally exceeded the proper amount their decision was not ultra vires and they had no power to amend it. In any view the amount of the surcharge, being for a round sum, is wrong. The items of account contrary to law which the auditor is authorized to surcharge are the specific payments for which the particular councillor was personally responsible by reason of his having voted for them.

Sir Douglas Hogg K.C. and *Sir John Lithiby* for the respondent. The appellants' contention that the Poor Law Amendment Act, 1844, when giving to district auditors exclusive jurisdiction to audit overseers' accounts, did not give them as wide a power as the justices formerly had, because nothing is there said expressly about reducing exorbitant charges, cannot be supported. Sect. 39 of that

(1) [1904] 2 K. B. 109.

Act, which says that the auditor's decision on the reasonableness of a law bill shall be final, assumes that he has the power to disallow unreasonable charges, for it does not in terms empower him to tax a law bill any more than a charge of any other kind. The power is to be found in s. 32, which authorizes district auditors "to examine audit allow or disallow of accounts and of items therein." Those words were intended to include a power to examine into the reasonableness of charges as well as their legality. The passage cited from Burn's Justice was not intended to suggest that the reduction by district auditors of exorbitant charges was out of date and no longer permissible, for the chapter in which it occurs is headed "What may be included in accounts," using the present tense. And at a more recent date the Local Government Board have issued an Order addressed to local authorities in which the powers of the auditor are stated in similar terms. The District Auditors Act, 1879 (42 Vict. c. 6), s. 5, provided that "Where any accounts of the receipts and expenditure of a local authority are subject by law to be audited by a district auditor, the Local Government Board may from time to time by Order make . . . . such regulations as seem to the Board necessary or proper respecting the audit of such accounts," and in pursuance of that section the Board made an Order on March 22, 1880, by art. 14 of which "In auditing the accounts the district auditor . . . . shall examine whether the expenditure is in all cases such as might lawfully be made. He shall also reduce such payments and charges as are exorbitant." That Order has now been acted upon for over half a century without objection, and unless it is ultra vires it covers this case. It derives its authority from the general provisions of s. 32 of the Act of 1844. The same question has arisen in Ireland under the corresponding Irish statutes. In *Rex* v. *Newell* (1) a portion of certain payments made to officers of a borough council for subsistence money while away from home on the council's business was disallowed by the auditor under s. 12 of the Local

(1) [1903] 2 I. R. 335.

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Government (Ireland) Act, 1871, by which the auditor "shall examine into the matter of every account and shall disallow . . . . all payments . . . . made by any person and charged upon the funds of any town contrary to law or which he deems to be unfounded." There was an earlier statute in pari materia, the Poor Relief (Ireland) Act, 1838, by s. 95 of which the auditors were to disallow "all such charges and payments as they shall deem to be illegal or unfounded," and also "shall reduce such as they shall deem to be exorbitant." The Court held that the omission of those latter words in the later Act made no difference, Palles C.B. saying: "I believe the reason why the words referred to were omitted is because they were redundant and tautologous." An application to bring up the auditor's surcharge was accordingly dismissed, and the Court held that, the payment objected to being severable, the auditor might properly disallow part; he was not bound to disallow the payment in toto. The Public Health Act, 1875, under s. 247 of which the present surcharge was made, contains a section, s. 249, in practically identical terms with those of s. 39 of the Poor Law Act, 1844, dealing with the finality of the auditor's decision on the reasonableness of a solicitor's bill. That section, like the section of the earlier Act, assumes that the auditor has power to deal with the question of reasonableness, it does not give it him. He gets his authority from the general words of s. 247, sub-s. 7, just as the auditor under the Act of 1844 got it from the corresponding words of s. 32. That an auditor acting under s. 247 of the Public Health Act has power to inquire into the reasonableness of the wages paid to servants appears clear from s. 189 of that Act, which says that "Every urban authority shall appoint or employ such . . . . officers and servants as may be necessary" and "may pay to the officers and servants so appointed or employed such *reasonable* salaries wages or allowances as the urban authority may think proper." No doubt s. 62 of the Metropolis Management Act, 1855, under which the servants were employed in the present case, says that the board or vestry may allow "such salaries and wages

as the board or vestry may think fit," not in terms requiring that the wages shall be "reasonable." But the absence of that word in s. 62 makes no difference. It was only omitted because it is implied, and it was unnecessary that it should be specified. Moreover, under sub-s. 6 of s. 247 "any ratepayer or owner of property in the district may be present at the audit, and may make *any* objection to such accounts before the auditor." The objections which a ratepayer may make under that sub-section would include objections to excessive wages, but it would be useless for him to make them if the auditor could not go into the question when raised.

Sir John Simon K.C. in reply. It is for the Court and not for the auditor to decide the question of fact whether the departure from what is reasonable is so wide as to constitute illegality, and unless the departure amounts to an illegality the auditor has no jurisdiction to disallow the payment. *Rex* v. *Newell* (1) is distinguishable. The statute on which that case was decided was differently worded. The judgment of Palles C.B. proceeded upon the word "unfounded," which he treated as including "exorbitant." The same view of the meaning of that word was taken in a later case, *Rex* v. *Browne* (2), where Dodd J., speaking of a payment by a district council of an annuity to the Commissioners of Public Works, said "the payment . . . . is neither contrary to law, nor unfounded, using that word in its widest sense so as to include wasteful or extravagant expenditure." But s. 247 of the Public Health Act contains no word corresponding to "unfounded." It speaks of payments "contrary to law" and nothing else. The Order of the Local Government Board of March 22, 1880, directing the auditor to reduce exorbitant charges was ultra vires, for their authority to make regulations was limited by the Poor Law Amendment Act, 1844, which was silent on that subject.

Cur. adv. vult.

(1) [1903] 2 I. R. 335. (2) [1909] 2 I. R. 333, 351.

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June 23. The following written judgments were delivered :—

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BANKES L.J. This appeal raises a question of serious general importance as to the jurisdiction of a district auditor to disallow and surcharge items of expenditure made by a local authority whose accounts he is under a statutory duty to audit. The local authority whose expenditure is in question is the council of the metropolitan borough of Poplar. By the combined effect of s. 71, sub-s. 3, of the Local Government Act, 1888, and s. 14 of the London Government Act, 1899, the accounts of that council are subject to audit in like manner as the accounts of an urban authority, that is to say by a district auditor acting as directed by s. 247 of the Public Health Act, 1875. That section provides in sub-s. 7 as follows : "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment." The appellants are a number of the members of the borough council whom the district auditor has held to have either made or authorized the making of certain payments which he has disallowed and surcharged as being payments contrary to law. The payments were all for wages paid to employees of the council, and the district auditor has disallowed them to the extent of 5000*l.* on the ground (inter alia) that to that extent at least they were unnecessary and unreasonable charges and therefore items contrary to law as charges upon the funds in the custody of the council. The appellants do not raise any question as to their being the persons who are answerable for the making of the payments, and therefore liable to be surcharged if the district auditor was entitled to disallow and surcharge the payments. The main point made by the appellants is that the district auditor had no jurisdiction to disallow the items, and they base their contention on two grounds : (1.) That his jurisdiction is confined to disallowing items of expenditure upon objects unlawful in themselves ; (2.) if he has any jurisdiction to

disallow items of expenditure upon lawful objects it can only be when the expenditure cannot be said to have been made bona fide. The appellants also say that if the above contentions are not upheld the district audiror has come to a conclusion upon the facts of the case which cannot be supported in law. As compared with the two first contentions, the last one, though of importance to the appellants themselves, is of comparatively little general importance.

A district auditor and a borough council are both statutory creations and their respective powers and duties must be sought for and found in the statutes to which they owe their existence. For the present purpose it is not necessary in the case of the district auditor to look beyond s. 247 of the Public Health Act of 1875, to which I have already referred, or in the case of the borough council beyond s. 62 of the Metropolis Local Management Act, 1855, which gives the council authority to appoint, employ, or continue for the purposes of the Act, such officers and servants as may be necessary, and to allow them such salaries and wages as the council may think fit. If it is borne in mind in interpreting this section that the council is a statutory body entrusted by Parliament with the duty of dealing with public money, and that the wages referred to in this section are payable out of public money as opposed to the private moneys of the individual councillors, I think that one has all the material necessary on which to found a decision upon the question of the district auditors' statutory jurisdiction in reference to the matters in dispute in this appeal.

Reference has been made to a number of statutes dealing with the powers of auditors on the one hand and the powers of local authorities in reference to the fixing of salaries and wages on the other, as throwing light upon the construction to be placed upon the two material sections in the present case. To my mind these references are of no real assistance —indeed, the effect which they have on my mind is the opposite of that which they were intended to have. I will briefly refer to some of them. On the question whether, having regard to the language of the section of the Public

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Health Act of 1875, a district auditor has power to disallow such parts of payments made for lawful objects as he may consider so unreasonable as to be contrary to law, reference was made to the Poor Law Relief Act, 1810, which, in dealing with the audit of the accounts of churchwardens and overseers by justices, authorizes them not only to disallow and strike out all such charges and payments as they shall deem to be unfounded, but also to reduce such as they shall deem to be exorbitant. Another statute referred to was the Poor Law Amendment Act, 1834, s. 89, which authorizes justices to disallow as illegal and unfounded all payments contrary to the provisions of the Act. Reference was also made to the Poor Law Amendment Act, 1844, which provided for the appointment of district auditors and gave them "full powers to examine, audit, allow or disallow of accounts, and of items therein, relating to moneys assessed for and applicable to the relief of the poor." I cannot accept the suggestion that Parliament, by adopting the shortened language of s. 247 of the Public Health Act, 1875, intended to curtail the jurisdiction of the auditor; on the contrary, the impression upon my mind is that with the precedents before him the draftsman wisely decided to avoid unnecessary verbiage. My conclusion is the same with reference to the statutes dealing with the payment of wages. In the Municipal Corporations Act, 1835, s. 58, the provision is that the salaries and allowances to be paid by borough councils to their officers shall be such as the council shall think reasonable. In the Public Health Act, 1848, the provision is for allowing such reasonable wages as the board may think proper. In the Commissioners of Sewers Act, 1848, s. 27, authority is conferred upon the commissioners to pay wages to their servants, no mention being made of reasonableness. In the Public Health Act, 1875, s. 189, the authority is to pay such reasonable wages as the urban authority may think proper. I cannot come to the conclusion that the Legislature, in giving the commissioners of sewers in 1848 authority to pay wages without any qualification whatever, or in giving a borough council in 1855 authority to pay such wages as

they thought fit, intended to confer upon either body authority to expend public moneys in paying unreasonable wages or to create any distinction between the wages lawfully payable to their employees by one class of public authority and by another. The conclusion I have come to from a consideration of these statutes is, as in the case of the audit, that the draftsman, with the precedents before him, considered the introduction of the word "reasonable" as superfluous and unnecessary and that Parliament agreed with him. The construction of the section which I have adopted is, I think, in entire accordance with the view of Palles C.B., as expressed in the case of *Rex* v. *Newell.* (1)

I approach the consideration of this important and difficult question therefore from the point of view that the contention that a district auditor has no jurisdiction to deal with obviously unreasonable payments for wages is untenable. I consider also that the contention that the test whether he has jurisdiction to disallow an item of payment is whether the payment has been made bona fide cannot be supported. If bona fides is relied upon as the test of legality, it must, I think, at least be defined before it can be accepted. Is the expression used in the sense that the act is free from corruption? Or in the sense that the actor honestly believes that he is acting within the law? Or in the sense that he honestly believes that he is entitled to pay as wages whatever sum he considers necessary to maintain a standard of living which he himself sets? Or in the sense that he honestly believes that he is entitled to pay as wages whatever sum his constituents desire should be paid? No attempt has been made to explain the sense in which the expression is used, and in my experience complete bona fides is so often associated with irregular and unreasonable conduct that I am unable to accept the test suggested.

The question which has to be decided is the extremely difficult one where, from the point of view of what is reasonable, the line is to be drawn between what are, and what are

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not, payments for wages contrary to law. It is of course necessary in this, as in every case where the question is what is reasonable, to take the actual existing circumstances into account. In *Hick* v. *Raymond* (1) Lord Herschell in a well-known dictum in reference to a question of demurrage said that what is reasonable time must depend upon the circumstances which actually exist. In searching for some principle which should guide one in approaching the question of what constitutes a payment contrary to law it has occurred to me that considerable assistance may be derived from the consideration of those cases in which the Courts have had to consider, upon applications for a prohibition or for mandamus, whether an inferior Court has exercised or has refrained from exercising its jurisdiction contrary to law. For instance, in *Reg.* v. *Adamson* (2), where magistrates had refused to issue summonses, the Court granted a rule upon the ground that the justices had taken into consideration extraneous matters which ought not to have affected their decision; in other words, they had acted contrary to law in taking such matters into consideration. In *Reg.* v. *Vestry of St. Pancras* (3) the question was whether the Court could interfere and require the vestry to hear and determine an application for a superannuation allowance to a retiring officer which they had refused to grant. The Court, in spite of the argument that the vestry had, and had exercised, a discretion in the matter, granted the rule upon the ground that the vestry had not directed their minds to the question which they had to decide and had taken into account circumstances which they ought not to have taken into account, and as a result had failed to properly exercise their discretion. A fuller statement of the principle on which the Court acts in this class of cases is to be found in a judgment of Farwell L.J. in *Rex* v. *Board of Education.* (4) The result of these authorities is that where the Court is considering whether an inferior Court has acted according to law, one test, and a very important test, is whether in

(1) [1893] A. C. 22, 29.
(2) (1875) 1 Q. B. D. 201.
(3) [1890] 24 Q. B. D. 371.
(4) [1910] 2 K. B. 165, 179.

coming to a decision it has taken into consideration extraneous circumstances which ought not properly to have been taken into account.

In my opinion the present question may usefully be approached with these decisions and these dicta in mind, and one may ask oneself whether, taking all the circumstances into consideration, it is plain that in fixing the rates of wages during the period in question the council must have taken wholly extraneous matters into consideration which it was not within their province to take into account. If they have so acted, then applying the principle of the cases I have referred to, they have been acting contrary to law. Mr. George Lansbury's argument addressed to the district auditor in support of the action of the council as set out in para. 13 of the district auditor's affidavit affords a good illustration. Could there be any doubt as to the illegality of the payments complained of if the action of the council was dictated by the considerations there indicated? It is in my opinion impossible for public authorities to justify the expenditure of public moneys upon any such considerations as are there set out. The arguments of Mr. George Lansbury, however, are not those on which the appellants seek to support the rule for a certiorari. These are contained in the joint affidavit of the Mayor of Poplar and others filed in support of the rule. The arguments there set out are of such a general and vague character that the question which the Court has to decide cannot be disposed of without a closer investigation of the facts. In the absence of precise and detailed information as to the grounds on which the council acted their action must, in my opinion, be judged mainly by its results. The results according to the finding of the district auditor are that the payments made in many instances were far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency, and were thus in reality gifts to their employees in addition to remuneration for their services. If this finding is justified upon the evidence it establishes, in my opinion, the making of payments contrary to law. It must be borne

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in mind what the payments are for. They are payments for wages; that is to say, the price which the employer pays the employee for his or her services. Of recent years the tendency has everywhere been to standardize wages by either fixing the actual rate to be paid or by fixing minimum rates. In some cases the Legislature has stepped in to bring about this result. In most cases it has been due to the action of organized labour or associations consisting of employers and employed. The result has been to create in relation to labour what, in relation to commodities, is recognized as a market price. In relation to labour the market price is not a universal one; it may and does vary according to local conditions, but I think it is true to say that the standard rate of wages in any given locality for any of the well recognized forms of labour is ascertainable and can be ascertained. A private employer can, of course, disregard all standard rates of wages in the sense that he can pay his employees as much above the standard rate as he pleases. His money is his own. He can employ it as he likes, and no one has any authority, statutory or otherwise, to complain if what he is in substance doing is making gifts to those he employs in addition to their wages. Not so, however, the public authority entrusted with the duty of the expenditure of public money. This expenditure, so far as it is expenditure upon wages, must be confined to expenditure upon reasonable wages, and what is reasonable can only be ascertained according to law by a consideration of those matters which are strictly relevant to that question. In the case of the private individual dealing with his own money it is not only competent to him, but it is a humane and praiseworthy action, to approach the question of what he shall pay his employees from the point of view of what will enable them to live up to what he considers a reasonable standard of comfort, and to disregard altogether the question of what other people are paying for similar services or the sum for which he could obtain the service. Not so in my opinion when a public authority adopt the same attitude. In their case they would be disregarding the relevant facts and would

be coming to a decision upon extraneous matter. They would be opening the door to the district auditor to enter and to disallow and surcharge. Considerable latitude should, in my opinion, be allowed before the line is drawn between what is and what is not an expenditure contrary to law. Weight should be given to every legitimate and relevant consideration which could be urged in support of the challenged payment. If, after that has been done, a district auditor finds that a payment has been made in excess of what can be supported on any such ground, then it appears to me that he has no option under the statute but to disallow and surcharge.

In this case it is necessary to get to close quarters not only with what the auditor has done and the grounds upon which he acted, but also with the reasons which have been and are put forward in support of the challenged payments. In his report dated June 7, 1923, and in his affidavit the auditor has set out very fully the grounds upon which he acted. In para. 8 of his affidavit he states that he caused careful calculation to be made both in detail and in the aggregate of the amounts by which the wages paid by the council exceeded (*a*) the agreed rates of the trade union and other awards appropriate to the several groups of employees, and (*b*) the 1914 wages paid by the council increased by a bonus proportionate to the cost of living. In a series of charts exhibited to the affidavit the auditor has compared the rates of payment made by the council with rates based on (*a*) and (*b*). In para. 25 of his affidavit he states that "Before making any disallowances I added to the rate arrived at in heading (*b*) a sum of 1*l.* per week." In substance what the auditor has done is to take for the purposes of comparison with the rates paid, first the rates of the Joint Industrial Council as representing what may be considered as standard rates, and secondly rates based upon the council's 1914 scales of payment which are shown in the affidavits to be generous, with additions representing the additional cost of living plus a 1*l.* weekly bonus. It is only where the rates paid by the council exceed the higher of these

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two figures that any disallowance has been made. Prima facie the auditor on this process of reasoning appears to have made out his case and to have allowed sufficient margin to cover any special circumstances or local conditions. The point emphasized by the auditor in para. 16 of his affidavit is that the council on August 31, 1921, resolved to the effect that no reduction of wage or bonus should be made during the ensuing four months, which was subsequently acted upon for twelve months in spite of the fact that very important reductions had already taken place in the cost of living and in the trade union and other awards, and that during the period of operation of the resolution further important reductions were likely to occur and did occur. Under these circumstances it is very material to consider the reasons put forward in support of the challenged items by the councillors. On May 18 the auditor issued a notice intimating that in auditing the accounts he found charges amounting to 17,000*l.* which were not legal charges, and that he had adjourned the audit to enable any one to make representations to him on the subject. On May 31 the adjourned meeting was held and the matter was formally argued out. The mayor and several councillors put the case from their point of view, and the auditor has set out in his report of June 7 the chief arguments with his replies. So far as the arguments relate to relevant and legitimate considerations the auditor appears to me to have admitted and allowed for them. There is one argument which is, I suspect, the convincing one with the council, and which I regard as extraneous and inadmissible. It is stated thus in para. 5 of the auditor's report: "That the function of audit in regard to protecting the interests of the ratepayers cannot properly be held to extend to protecting themselves against themselves, and that in view of the pronounced decision of the electors in November, 1922, and at subsequent by-elections in favour of maintaining the scales of payment adopted by the council there is no call for any disallowance in the accounts." This is only stating in more restrained language Mr. George Lansbury's contention as set out in para. 13 of the auditor's affidavit.

When the attitude of the council and the reasons for their action are carefully set out as they are in the affidavit of the mayor and others in support of the rule, the statement made in para. 9 is: "The council did not and does not take the view that the wages paid should be exclusively related to the cost of living, they have from time to time carefully considered the question of the wages and are of opinion as a matter of policy that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their work-people, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decision as to wages." A less helpful statement upon the particular issue whether the council took extraneous matters into consideration it is difficult to imagine. The desire to be a model employer may lead a person or a council to ignore altogether current or standard rates of wages. The amount which a man ought to be paid as wages suggests that the question of what is a legal payment for wages was not a relevant consideration. Taking the auditor's conclusions on the one hand and the council's attempted answers on the other, I am forced to the conclusion that the rates of wages paid by the council during the period in question were in excess of any rates which could be justified on grounds which the council were entitled to take into consideration. If this is so, it is in my opinion immaterial that the auditor has disallowed a lump sum and a sum considerably below what, according to his view, might have been disallowed. It is immaterial also, in my opinion, that the sum disallowed, if spread over the whole number of employees, is a very small sum per head. Once the dividing line is passed between what is legal and what is not legal then all payments beyond those which are legal must be disallowed, provided, of course, that in the aggregate they are not a mere trifling amount.

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In my opinion the appeal fails and should be dismissed, but as my brethren think otherwise it will be allowed and the rule for a certiorari made absolute.

SCRUTTON L.J. Members of the Poplar borough council appeal against a decision of the Divisional Court, affirming a surcharge imposed on them by the district auditor in respect of wages payments which he finds to be excessive. It was decided by this Court in *Rex* v. *Carson Roberts* (1) that such an appeal lies to the Court both as to fact and law; and, by the majority of this Court in the same case, that the surcharge may be imposed on those who authorize such excessive payments, though they do not in the strict sense account. The powers of the auditor are contained in s. 247, sub-s. 7, of the Public Health Act, 1875. He is to disallow every item of account "contrary to law"; and is to charge against any person accounting the amount of any deficiency or loss incurred "by the negligence or misconduct" of that person. It was not argued before us that the conduct of the councillors in this case amounted to "negligence or misconduct." Counsel for the auditor said: "I don't charge dishonesty; the councillors honestly believed they had a right to do what they did for the reasons that influenced them, but the reasons were not matters they should consider, and they neglected cost of living. I don't charge negligence. I charge them on the ground that their action was contrary to law." He explained that it was contrary to law in that the rate of wages paid was an exorbitant, excessive and unreasonable rate. It was argued by counsel for the appellants that though before 1844 the magistrates who then approved auditors' accounts were by the statute of 1810 required "to disallow all such payments as they shall deem to be unfounded and to reduce such as they shall deem to be exorbitant," yet as when after the establishment of district auditors by the Act of 1834, and the decision in *Reg.* v. *Earl of Dartmouth* (2) that the magistrates could allow items the auditor disallowed, the Act of 1844 by s. 37

(1) [1908] 1 K. B. 407. (2) 5 Q. B. 878.

made the district auditor the sole allowing body, and by s. 32 gave him power to allow or disallow accounts, to surcharge "illegal payments" and to charge "the amount of deficiency or loss incurred by the negligence or misconduct" of any person accounting but omitted any reference to exorbitance or excess, the auditor therefore had no longer any power to tax the amount of a payment made for a legal purpose. This raises a question of great public importance. Representative bodies exercising functions of local government at present are subject to audit of two kinds. The audit of municipal corporations, speaking generally, is by elective auditors. Sect. 27 of the Municipal Corporations Act, 1882, merely authorizes them to audit the accounts of the borough treasurer, which must be submitted with the necessary vouchers and papers. But Lord Russell in *Thomas* v. *Devonport Corporation* (1) says that the auditor is not limited to getting a regular voucher for each item, that he is entitled to see that there are not among the payments unauthorized or illegal or improper payments. He does not specifically refer to the question of improper amount of payment for a proper object. The second kind of audit by district auditors who are Government officials, and whose decisions, besides being controlled by the Courts, are also open to appeal to the Local Government Board, applies to a very large number of local authorities. The powers of such auditors are either under the Public Health Act, or under the Poor Law Act of 1844, both already cited. When Palles C.B. in the Irish case of *Rex* v. *Newell* (2) dealt with the powers of an auditor, he was interpreting the provisions of the Irish Local Government Act that the auditor shall examine and disallow all payments "contrary to law or which he deems to be unfounded." These last rather odd words are the same words as occur in the Act of 1810, where they are followed by the words "and to reduce such as they shall deem to be exorbitant." Palles C.B. however treats the words, even without the provision as to exorbitancy, as justifying the auditor in striking out any excess of payment

(1) [1900] 1 Q. B. 16, 21. (2) [1903] 2 I. R. 335.

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beyond a reasonable amount. In the previous case of *Rex* v. *Carson Roberts* (1) the question of excessive amount of payment hardly arose, but Farwell L.J. did say that, while the auditor could not control policy, he could control administration, taking as an example of the latter the amount of wages paid for a purpose, which as a matter of policy was within the functions of the representative body and therefore not within the control of the auditor. I think it is obvious that Fletcher Moulton L.J. did not agree with the distinction between policy and administration, and indeed objected to any surcharge of individuals for merely authorizing payments; but in this latter point the majority of the Court did not agree with him, though as the whole Court thought there was no case for surcharge, it was not strictly necessary to decide the point. In the District Auditors Act of 1879 Parliament gave the Local Government Board power to make regulations "respecting the audit of accounts and the mode of conducting the audit," and in the Order made the Board told the auditor "to examine whether the expenditure can be lawfully made. He shall also reduce such payments or charges as are exorbitant . . . . and shall surcharge moneys lost . . . . upon the persons whose negligence or improper conduct caused the loss." I do not think the Act of 1879 authorized the Board to confer on the auditor greater powers than he already possessed. But in my view, after considering the statutes, the power to disallow payments contrary to law includes a power to disallow a payment in excess of a reasonable amount, reasonableness being judged as hereinafter explained. I agree with the view of Palles C.B. on this point. Indeed, I gathered that the Poplar borough council were not inclined to go so far as to say that they might pay, without check other than that of their electors, salaries of whatever amount they pleased. Such payments would be either misconduct, or contrary to law, or both. Each borough councillor is bound in my view to use reasonable care in his administration to protect the interests of all inhabitants of his borough, whether electors or not, whether

(1) [1908] 1 K. B. 407.

ratepayers or not, whether individuals or corporations—he is, in the language of the judicial oath, "to do right to all manner of people." To make excessive expenditure, or expenditure without reasonable justification, seems to me contrary to his legal duty, contrary to law. But in determining what is reasonable and what is excessive, I think the auditor must give full effect to the consideration that he is dealing with a representative body entrusted by Parliament with wide powers. The considerations stated by Lord Russell in *Kruse* v. *Johnson* (1) as to the attitude which the Courts should assume to by-laws made by representative bodies which they are asked to find unreasonable seem to me to apply, though in a lesser degree, to auditors dealing with alleged excessive payments made by a representative body, where honesty is admitted and misconduct is not alleged. A wide margin should be allowed for error of judgment, not amounting to misconduct, or for deliberate policy, not being illegal, with which the auditor cannot interfere. I, therefore, disagree with Sir John Simon's first contention that the auditor has not power to tax payments made for authorized purposes. His second contention was that if there was such a power it should only be exercised in the case of an excessive payment for a lawful object, if it was so excessive that the decision to make it was not a bona fide exercise of discretion. While I sympathize with this view, I think it goes too far as a rule of conduct. Good faith is not in my view sufficient by itself; some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, but yet quite beyond the limits of reasonableness. I think there must be a limit to justifiable payments, which depends on their relation to work done and its market value, as well as to good faith in the person authorizing the payment; and a system which pays unskilled labour of a low grade higher wages than are being earned in the market by organized skilled labour may easily pass the bounds of reasonableness, though the system is adopted in good faith. On the question of principle as to a

(1) [1898] 2 Q. B. 91, 99.

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district auditor's powers, I am against the contentions of the appellants to the extent and for the reasons stated above.

There remains the less important question whether for the particular year of audit the auditor came, in fact, to a right conclusion. His conclusion, in fact, is open to review by this Court, and the objection that we should not lightly interfere with the decision of the auditor also includes the objection that the auditor should not lightly interfere with the honest decision of a representative body. The auditor has given five useful graphs of the wages paid to different classes of workmen. It appears that the policy of the Poplar Council was to pay 4*l.* a week to most of their workmen, and not to increase it, though the wages recommended by the Whitley Council and the wages obtained by adding the extra cost of living to the 1914 rate were above it. This is especially true of graphs 1 and 3, involving 350 men, in which the auditor makes no surcharge. In graph 4, involving 100 men, the wages were reduced for the first four months of the year, but remained at 4*l.* for the rest of the year, though the cost of living fell steadily. In graph 5 the wages of skilled men, 75 in all, were kept at the trade union rate for about four months of the year, and then remained above it to an extent of not more than 8*s.* a week, sometimes only 4*s.* a week. For the women, 44 in all, they were paid the same rate as men, 4*l.*, and this was considerably above the Whitley Council or cost of living wages rate. The view of the council was that the 1914 rate was too low, that to add to the 1914 rate the extra cost of living did not give a proper living wage, and that 4*l.* was the minimum wage that a model employer should pay to his workmen. The auditor took the view that he could get the maximum reasonable wage by taking the 1914 rate of wage, adding to it the extra cost of living, and then adding 20*s.* a week to cover a reasonable variation in the discretion of the employer. He calculated the excess of wages actually paid over this maximum reasonable rate as 5000*l.*, or approximately 7*s.* per week per workman, and surcharged those members who voted for maintaining the 4*l.* a week rate with this 5000*l.* At least

two questions of policy seem involved in the council's action: one that the 1914 rate is not a fixed basis from which to start the computation of wages to be paid, but may be increased in the discretion of the council; the second, that women should be paid equal wages with men, a matter of acute controversy, which is hardly for either the auditor or the judges to determine. I also take into account that in 1921 it was not certain whether the cost of living, which had risen in 1920 and then fallen, would not rise again. I then ask myself whether the wages paid in the year April, 1921—April, 1922, are so far in excess of Whitley Council or cost of living rates that I can find that there is an excess over any reasonable amount that could be fixed by the discretion of a representative assembly, and in doing this I act on Lord Russell's principle in *Kruse* v. *Johnson* (1), with a desire to support the representative assembly, and I come to the conclusion that for that year, and I limit my conclusions to that year, though the figures are near the line where interference should take place, I cannot find they have reached it. The question is not whether I should have sanctioned these wages; I probably should not: nor whether the auditor or the Whitley Council would have sanctioned these wages; it is for the Poplar borough council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body.

Nothing, however, that I have said must be taken to show that the auditor cannot surcharge in the next year 1922–1923; I have not heard the matter argued, but the graphs are very striking and the excesses apparently very large. The auditor must consider the matter in this year in the light of the views of this Court as to his duties and powers. The appeal against the surcharges for the year 1921–1922 must be allowed.

ATKIN L.J. This case raises a question of great importance in local government law. In the year April, 1921, to March 31, 1922, the Poplar borough council appear to have had in

(1) [1898] 2 Q. B. 91, 99.

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their employment over 600 men and women. During part of that year they paid rates of wages to their employees which were in excess of the minimum wages fixed by awards of the Joint Industrial Council, or of the rate which would be arrived at by increasing the rate of weekly wages paid in 1914 by a bonus proportionate to the officially recognized increase in the cost of living. The district auditor in auditing the accounts for the year in question has come to the conclusion that the total payments of wages made by the council are so excessive as to be contrary to law; and after making what he considers to be a reasonable allowance for a scale of wages which would be within the law, he has surcharged a number of the councillors with a total sum of 5000*l.* The councillors move by way of appeal from an order of the Divisional Court discharging a rule nisi for a writ of certiorari to bring up and quash the certificate of disallowance and surcharge of the auditor. The powers of the auditor depend upon s. 247, sub-s. 7, of the Public Health Act. The only words I need read are: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment." The material question in this case is whether the 5000*l.* was an item or items of account contrary to law, and its payment an illegal payment. I see no distinction between the two phrases. The metropolitan borough councils, like the public authorities to whom the Public Health Act primarily applies, are statutory bodies deriving their powers of collecting revenue and making payments thereout from the statutes which constituted them. A payment which is not within the statutory powers will be ultra vires and contrary to law. A payment which is within the statutory powers will be intra vires and not contrary to law. The auditor's power in the part of the section which I have read appears to me to be strictly limited to surcharging such payments as are beyond the powers of the council to make. In this class of payment I include such payments as are made for purposes forbidden by statute or common law.

The test of the validity of the surcharge will, therefore, in most cases, and I think in the present case, correspond with the test of the validity of the contract under which the payment is made. Could the respective workmen have sued for and recovered the total wages paid? I raise this point at the outset to emphasize the fact that the interest of the dispute is not confined to the councillors or the ratepayers, but extends to the numerous class of people who are servants of local authorities. It is not disputed that under the provisions of the Public Health Act the decision of the auditor is not conclusive, but on certiorari is subject to review by the Court in fact as well as law. This has been decided in England and Ireland, and I have no doubt is sound law.

The first objection made by counsel for the councillors was that the power of the auditor only extended to payments that were wholly made for unlawful objects, and did not admit of the reduction of a payment made for an object in itself lawful, such as the payment of wages to a necessary servant, where the objection was only to part of the amount paid. This objection was based upon a survey of statutes in pari materia, and the omission in the Public Health Act of words found in former Acts dealing with exorbitant payments. The objection appears to me ill-founded. The words of the section are clear: a payment can be in part lawful and in part unlawful, as, for instance, if there is a scale of payments which has statutory authority and the statutory maximum is exceeded. In my opinion the auditor's duty necessarily extends to disallowing the excess. I proceed, therefore, to consider whether the payments to the extent surcharged were contrary to law.

The powers of the metropolitan borough councils to employ and pay servants are those of their predecessors given by s. 62 of the Metropolis Management Act, 1855: "shall appoint or employ . . . . for the purposes of this Act, and may remove at pleasure, such clerks, treasurers and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers and servants respectively such salaries and wages as

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the board or vestry may think fit." The first question that arises is whether this section gives the local authority unfettered discretion as to the amount of wages provided they act bona fide, or whether their powers are limited to paying such reasonable salaries and wages as they may think fit. In the latter view the test of reasonableness would be an objective standard to which the council must conform. In coming to a conclusion on this point it is desirable to recall the words of the section giving power to the local authority to employ such servants "as may be necessary." To comply with this section must the council be able to satisfy some external authority, the auditor or the Court, that all the servants employed are in fact necessary? Would it be open to the auditor to disallow the payment for four charwomen out of forty-four if he thought forty sufficient, or ten dustmen out of 144 if his experience led him to the belief that the work could be done by 134? It appears to me that the final decision upon this point must rest with the local authority, they acting in good faith. If this is true of the numbers and classes of servants employed, I think it must also be true of the wages, always assuming good faith. It is, I think, noteworthy that at the time of passing the Act of 1855 a difference in phraseology in granting powers of paying wages existed already. In the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 37), the provision is that: "The local board may pay out of the general district rate such reasonable salaries, wages or allowances as the said local board may think proper." In the Metropolitan Commissioners of Sewers Act, 1848 (11 & 12 Vict. c. 112, s. 27), the provision is: "The commissioners shall appoint and employ such clerks, treasurers and other officers and servants as may be necessary or proper and allow salaries, wages or remuneration to such officers or servants"; and concludes with a provision that if the commissioners deem it just that any servant should be paid a retiring pension or allowance it shall be lawful for the commissioners to order the payment of such pension or allowance as to the commissioners shall seem meet. The latter provision gives the commissioners

an unrestricted discretion as to amount: see *Livingstone* v. *Westminster Corporation*. (1) The same distinction in phraseology between paying reasonable wages and paying such wages as the authority shall think proper is maintained in the two statutes now governing the respective powers as to the payment of wages by local authorities given by the Public Health Act, outside the metropolis, and by the Metropolis Management Act of 1855 respectively. In the Public Health Act of 1875, s. 189, the power is to pay such reasonable wages as the urban authority may think proper; in the Metropolis Management Act of 1855 as already cited the stipulation as to reasonableness is not present. I think, therefore, that there is no reason for not giving the words of the section their plain and unrestricted meaning. It is said that, so construed, the section gives a metropolitan borough council the power of paying extravagant wages, such as, for example, 30*l.* a week to an office boy. The answer, I think, is to be found in the restriction that the council must act in good faith. They must determine the amount of wages as wages in an existing industrial system; they must not fix the amount as a dole or as a bribe, or with any object other than that of fairly remunerating the servant. They are not to use the servant or his wages as a means of subverting existing institutions. The suggested instance would not be likely to pass this test. In this case bad faith is not alleged by the auditor or found by the Divisional Court. Indeed, it is stated in the judgment below that it is admitted that the council exercised their discretion honestly. In these circumstances I think that the auditor had no power to make the surcharge in question.

In this view it becomes unnecessary to consider what the position is if there is to be read into the section a restriction to pay reasonable wages. But as the case was decided on this point below, I propose to say a few words about it. It seems to me to be essential to remember that we are dealing with powers given to public bodies consisting of representatives elected by the public on a wide franchise for

(1) [1904] 2 K. B. 109.

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comparatively short periods. I venture to doubt the legal value of the proposition of the Court below that "the council are in a fiduciary position not merely towards a majority who have elected them but towards the whole of the ratepayers." If it is sought to impose upon the councillors the liability of trustees to their cestuis que trust, the analogy fails. That trust and confidence are bestowed upon them is true; that they may not use the powers entrusted to them for their own advantage is also true. But for the proposition that there are any equitable rights in the ratepayers as such, which can be enforced by the interference of a court of equity with the honest administration of affairs, I know of no authority. The duty of the council is to the local community as a whole. It must be inadvertence which suggested any special fiduciary relation to the majority which elects them. Whatever the duties are, they are public duties and must be judged accordingly. If the duty is to pay reasonable remuneration for services the standard of reasonableness is difficult to ascertain. It cannot be, I think, a duty to pay the lowest price at which the services could be obtained. I am unable to distinguish in this respect between the power to buy commodities and the power to buy services. It can hardly be maintained that a borough council are obliged to buy goods in the cheapest market. If so, they are presumably under a duty to ignore local or even British contractors if they can be supplied as efficiently elsewhere. But that they may refuse to accept the lowest tender is established by *Rex* v. *Carson Roberts.* (1) In applying the test of reasonableness to a public authority I find much assistance from the judgment of Lord Russell of Killowen in the case of *Kruse* v. *Johnson.* (2) He was dealing with by-laws made by a local authority, but the principles stated are closely relevant. He says this: "But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the

(1) [1908] 1 K. B. 407. (2) [1898] 2 Q. B. 91, 99.

manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey* v. *Williamson* (1), an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested." It appears to me that in cases of this kind the onus is heavy upon those

(1) (1873) L. R. 8 Q. B. 118, 124.

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who seek to make out that a payment is ultra vires because unreasonable in amount. In proceedings for a writ of certiorari, as in other proceedings, no doubt the onus in the first instance is upon the actor—the litigator: in this case the councillors. But once they establish that the payment was made honestly in the course of their administrative duties I think that they transfer the onus to the auditor to justify the surcharge. There is no presumption in favour of the surcharge being correct. I do not agree with the view of the Divisional Court that in cases near the line it would be difficult for the Court to over-rule an auditor, though I do agree that it would be difficult for an auditor to surcharge. Where a case is admittedly near the line I can hardly conceive the circumstances in which the Court would allow the opinion of the auditor to over-rule the honest decision of the council.

Examining the facts of this case, I find that in every case of the male employees the alleged offence of the council is not that they unreasonably raised the wages of their servants. In all cases the wages of their servants in question had, in consequence of the results of war conditions, been at one time in excess of the amounts paid by the council in 1921–22. The complaint is that they did not reduce the wages to correspond with the admitted fall in the cost of living. In view of the fact that the official figures as to cost of living have no statutory authority and are not universally accepted as accurate: that even the official figures do not show a continuous decrease but during the period in question and in the next year at times show an increase after a decline: that the council are not bound to treat the pre-war standard of living as the maximum on which to base the wage rate and cost of living bonuses: and that the alleged unreasonable excess does not amount to more than about 7*s.* a week on wages ranging from 80*s.* to 95*s.* a week, I think that it is not made out that the wages paid are so unreasonable as to be ultra vires the council. The case of the women is different. The wages of all women seem to have been put up in May of 1920 from 50*s.* to 80*s.*, and to have been maintained at that

rate. At the beginning of the period in question the maximum payable under awards of the Joint Industrial Council was 69*s*. 3*d*. The 20*s*. margin allowed by the auditor would make the allowable wage at the beginning of the period 75*s*. instead of the 80*s*. paid by the council, though the cost of living substantially declined on the whole during the period. The number of women employed is 44. Possibly the action of the council was based upon the view that women ought to receive equal pay with men for equal work. In any case I cannot think that the council acted so unreasonably as to be acting ultra vires in this respect.

I may add that I think that the particular method of surcharge adopted in this case is very difficult to justify under the statute. The particular payment which is ultra vires should be specified so that each individual surcharged should be in a position to know what sum he is liable for, and make a defence to that particular payment if he can. I do not however propose to decide this case upon such an objection.

I think that the rule should be made absolute.

Appeal allowed.

[No order as to costs, except that the costs of the appellants should be paid out of the parish or union rates of Poplar. (1)]

Solicitor for the appellants: *W. H. Thompson.*
Solicitors for the auditor: *Last, Sons, & Fitton.*

(1) See s. 35 of the Poor Law Amendment Act, 1844.

J. F. C.

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July 8, 22.

JONES *v.* OCEANIC STEAM NAVIGATION COMPANY, LIMITED.

[1923. J. 327.]

Conflict of Laws—Lex loci contractus—Contract of Carriage by Sea—Clause void by Law of the Country of Contract—Clause valid by English Law—Intention of Parties.

The plaintiff was received by the defendants, a British company, under a contract made in Detroit, to be carried in one of their steamships from New York to Southampton. The contract contained a clause that the shipowners should not be liable for loss, damage or delay to a passenger or his baggage arising from the act of God, or from causes of any kind beyond the carrier's control, even though the loss, damage or delay might have been caused by the neglect or default of the shipowners' servants. It was further provided that all questions arising under the clause should be decided according to English law. A subsequent clause provided that no claim under the contract should be enforceable against the shipowners unless a written notice thereof was delivered to them within three days after the passenger should be landed from the steamer at the termination of her voyage. In the course of the voyage one of the plaintiff's hands was injured by reason of the negligence of the defendants' servants, but no written notice of any claim was given by the plaintiff within the time limited by the contract:—

Held, that the language of the contract showed that it was the intention of the parties that it should be wholly governed by English law, that the clause relieving the defendants from liability for the negligence of their servants, though void by the law in force in Detroit, was valid and enforceable by English law, but that, applying the ejusdem generis rule, the clause did not absolve the defendants from liability for the plaintiff's injury.

But *held*, that as the plaintiff had failed to give any written notice of his claim within the time prescribed by the contract, he was not entitled to recover.

In re Missouri Steamship Company (1889) 42 Ch. D. 321 applied.

ACTION tried before Lord Hewart C.J. and a special jury.

The plaintiff, a British subject, claimed to recover damages for personal injuries sustained by him while he was a passenger on the steamship *Majestic* belonging to the defendants, a British company, owing to the negligence of the defendants' servants. The plaintiff alleged that on September 16, 1922, under a contract made in Detroit, he was received by the defendants as a passenger to be carried by the *Majestic* from

New York to Southampton, that the defendants, by their servants, were negligent in not properly securing the porthole glass in his room, and that in consequence his left hand was seriously injured.

The evidence and the arguments were heard before Lord Hewart C.J. on July 8, 1924, when it was agreed that all questions, except the questions of negligence and the amount of damages, should be left to him. The jury found for the plaintiff upon the question of negligence, and assessed the damages at 1073*l.* 10*s.*

A. S. Comyns Carr K.C. and *Ignatius Kelly* for the plaintiff.
Merriman K.C. and *H. L. Beazley* for the defendants.

Cur. adv. vult.

July 22. LORD HEWART C.J. read the following judgment: In this action the plaintiff, a British subject, seeks to recover damages for personal injuries sustained by him while he was a passenger on the steamship *Majestic*, a British ship, owned by the defendants, a British company, those injuries being due, as he alleges, to negligence on the part of the defendants' servants. His case is that on September 16, 1922, he was received by the defendants in pursuance of a contract made in Detroit, as a passenger to be carried by that ship on a voyage from New York to Southampton; that the defendants by their servants were negligent in that the porthole glass in his room was not properly secured but was revolving at a high speed when he attempted in the early morning of September 17 to draw the curtains aside; and that the glass then caught his left hand and seriously injured it. The evidence and the arguments were heard on July 8 last, when it was agreed between the parties that all questions should be left to me except the question of negligence and the amount of the damages. It was not seriously denied on behalf of the defendants that one at least of their servants had acted negligently in the matter, nor that the injuries of the plaintiff were caused by that negligence; and the jury, subject to

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certain questions of law which were by common consent reserved, found in favour of the plaintiff upon the issue of negligence and assessed the damages provisionally at 1073*l.* 10*s.*

The question remains whether the defendants are exempted from this liability by the conditions of the contract. Two conditions, the third and the ninth, are relied upon. The third condition is in the following terms: "Neither the shipowner, agent, nor passage broker shall be liable to any passenger carried under this contract for loss, damage, or delay to the passenger or his baggage, arising from the act of God, public enemies, arrests or restraints of princes, rulers or people, fire, collision, stranding, perils of the seas, rivers or of navigation of any kind, accidents to or from machinery, boilers, steam, latent defects . . . . or from causes of any kind beyond the carrier's control, even though the loss, damage, or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible. . . . . All questions arising under this paragraph of the contract shall be decided according to English law with reference to which it is made." It was at first contended on behalf of the plaintiff that by the lex loci contractus a carrier is prevented from stipulating that he shall not be liable for the negligence of his servants, that the condition is therefore absolutely void, and that the contract takes effect as if no such condition had been inserted. *The Kensington* (1) was cited. I entertain no doubt that according to the law in force in Detroit, where the contract was made, and also in New York, where the voyage began, such a condition is treated as void, either as being contrary to public policy or as lacking the ingredient of voluntary assent. But the condition is perfectly valid by English law, and it is not, I think, seriously suggested that according to the lex loci contractus it is illegal for subjects of another country to contract with reference to the law of that country although that law may treat such a condition as valid. The first question which arises, therefore, is whether the contract is governed by American or by English law.

(1) (1902) 183 U. S. 263.

It was laid down in *In re Missouri Steamship Co.* (1) that where a contract is made in one country to be performed wholly or partly in another country the Court will look at all the circumstances to ascertain by the law of which country the parties may be presumed to have intended the contract to be governed, and will enforce it accordingly unless it should contain stipulations contrary to morality or expressly forbidden by positive law. In that case the contract was made between an American citizen and a British company of shipowners for the carriage of cattle from Boston to England in a British ship, and it contained a stipulation that was valid according to English law but was void by the law of Massachusetts on the same grounds as those on which the condition under consideration in the present case is void according to the lex loci contractus. It was unanimously held by the Court of Appeal that the contract was governed by English law, and that the stipulation was valid, one of the circumstances that were regarded as indicating an intention to contract with reference to English law being the insertion of the stipulation which was impugned. The principle that in case of a conflict of laws the presumed intention of the contracting parties is the governing factor in the question what law is to be applied was affirmed by the House of Lords in *Hamlyn & Co.* v. *Talisker Distillery.* (2)

The present case is stronger in favour of the applicability of English law than *In re Missouri Steamship Co.* (1), inasmuch as here the plaintiff is a British subject permanently resident in England, and the contract expressly provides that all questions arising under the third condition shall be decided according to English law, and it is not probable that the parties would intend that some parts of the contract should be governed by the law of one country and other parts by the law of another country. In my opinion the whole contract is to be interpreted and enforced according to the law of England.

The next question which arises is what is the true interpretation of the condition according to English law. Mr. Merriman contended that it was to be construed very

(1) 42 Ch. D. 321. (2) [1894] A. C. 202.

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widely, and exempted the defendants from liability for the negligence or default of their servants, whatever might be the nature of such negligence or default, provided that it was beyond the carrier's personal control. It was argued for the plaintiff, on the other hand, that the rule of ejusdem generis applied to the words "causes of any kind," and that only such negligence or default was comprised in the condition as related to the matters specified or matters ejusdem generis therewith, and the cases of *In re Richardsons and Samuel & Co.* (1) and *Thorman* v. *Dowgate Steamship Co.* (2) were cited. In *Ryan* v. *Oceanic Steam Navigation Co.* (3) Vaughan Williams and Kennedy L.JJ. used language which might be taken as indicating that they thought the condition should receive the wide interpretation contended for. But in that case the negligence was in the navigation of the vessel, and navigation is one of the matters specifically mentioned in the condition. The question, therefore, of the application of the rule of ejusdem generis did not arise. There is not in the terms of the contract under consideration any indication of an intention to exclude that rule such as there was in *Larsen* v. *Sylvester & Co.* (4) Indeed some of the other conditions (i.e., conditions 4, 5 and 12) seem rather to indicate that the third condition was intended to receive a narrower interpretation than that which is contended for by the defendants. In my opinion the principle of ejusdem generis applies in this case, and the defendants are not absolved by the third condition from liability for the injury of which the plaintiff complains.

The ninth condition provides as follows: "No claim under this ticket shall be enforceable against the shipowner or his property or the agent or passage broker unless notice thereof in writing with full particulars of the claim be delivered to the shipowner or agent within three days after the passenger shall be landed from the transatlantic ocean steamer at the termination of her voyage, or, in case of the voyage being abandoned or broken up, within seven days

(1) [1898] 1 Q. B. 261.
(2) [1910] 1 K. B. 410.
(3) [1914] 3 K. B. 731, 749, 765, 770.
(4) [1908] A. C. 295.

thereafter." It is common ground that no notice of a claim, in the ordinary sense of the term, was given within the time limited. But it was contended on behalf of the plaintiff, first, that the contract is governed by American law, according to which such a condition is not valid unless it is reasonable, *Missouri, etc., Ry. Co.* v. *Harriman* (1) and *Gooch* v. *Oregon Short Line Railroad Co.* (2) being cited, and I am asked to say that the condition is unreasonable; secondly, that the condition had in substance been satisfied, because certain reports had been made to the defendants by the surgeon and others giving full particulars of the accident: see *The Henry S. Grove* (3); and, thirdly, that the defendants had waived the performance of the condition, or were estopped from saying that it had not been performed, by reason of a representation made by the purser to the plaintiff to the effect that, in view of the reports of the accident already mentioned, no further steps were necessary upon his part in order to give notice of his claim. With regard to these contentions: (1.) I have already stated that in my opinion the contract is governed by English law, and, if that is so, the question of reasonableness does not arise. But, even if that question did arise, I am unable to hold that the condition is unreasonable. (2.) I do not think that the reports referred to can be treated as equivalent to notice of a claim for the purposes of the contract. They make no mention of a claim, and they are consistent with the possibility that no claim would follow. (3.) It was not in my opinion within the express or implied authority of the purser to alter the terms of the contract or to waive any of its conditions: see *Grant* v. *Norway* (4); *Pearson* v. *Goschen* (5), or to make any such representation, and there is therefore no waiver or estoppel binding the defendants: see *Barnett, Hoares & Co.* v. *South London Tramways Co.* (6)

It may be added that no point was made on behalf of the plaintiff with reference to the mode in which the conditions

(1) (1913) 227 U. S. 657.
(2) (1922) 258 U. S. 22.
(3) (1923) 292 Fed. Rep. 502.
(4) (1851) 10 C. B. 665, 687.
(5) (1864) 33 L. J. (C. P.) 265.
(6) (1887) 18 Q. B. D. 815.

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were printed upon the document handed to him as his ticket. On the contrary it was frankly admitted that the plaintiff knew there was printing on the ticket, and knew that the printing contained perfectly legible conditions relating to the terms of the contract. He did not, however, choose to read them.

The result is that in my opinion—a conclusion to which I have come with regret—the plaintiff is precluded from recovering by reason of non-compliance with the condition requiring notice of claim, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Swann, Hardman & Co.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

F. C.

Referred to. FRANCIS JACKSON DEVELOPMENTS LD. v. HALL [1951] 2 K. B. 488

Applied. TURNER v. BAKER. [1949] 1 All E.R. 560.

Distinguished. JOHN M. BROWN LD. v. BESTWICK [1951] 1 K. B. 21

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[IN THE COURT OF APPEAL.]

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Distinguished. FRANCIS JACKSON DEVELOPMENTS, LTD. v. HALL [1951] 2 All E.R. 74.

Landlord and Tenant—Dwelling-house—House let unfurnished—Sublet furnished—How far Increase of Rent, etc., Act, 1920, *applies*—10 & 11 *Geo.* 5, *c.* 17, *s.* 12, *sub-s.* 2, *Proviso* (*i.*), *sub-s.* 6.

By para. (i.) of the proviso to s. 12, sub-s. 2, of the Increase of Rent, etc., Act, 1920: "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture":—

Held, that the word "let" there means "let to the occupying tenant," and therefore where a landlord let a house unfurnished to a tenant who let it to a sub-tenant furnished, the former could not on an application by the landlord for possession claim the protection of the statute.

By s. 12, sub-s. 6: "Where this Act has become applicable to any dwelling-house . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

By Scrutton L.J.: The furnishing and letting furnished of a dwelling-house which had previously been let unfurnished is a sufficient destruction of its identity, within the principle of *Phillips* v. *Barnett* [1922] 1 K. B. 222 to exclude the application of the above sub-section.

Judgment of Divisional Court, reported ante, p. 365, affirmed.

APPEAL from a Divisional Court.

The plaintiff, who was the owner of a block of flats at

Brixton, let one of the flats to the defendant Mrs. Hunter at a rental of 19*s.* 6*d.* per week. That flat Mrs. Hunter furnished and sublet to one Redlar. The plaintiff gave Hunter notice to quit, and subsequently brought an action in the Lambeth County Court against her and the sub-tenant Redlar to recover possession. The defendants claimed the protection of the Increase of Rent, etc., Act, 1920. The county court judge gave judgment for the defendants. On appeal the Divisional Court (Bailhache and Acton JJ.) held that as at the material time—that is to say when the landlord applied for possession—the flat was let at a rent which included payment for the use of furniture, it was by virtue of proviso (i.) to s. 12, sub-s. 2, excluded from the protection of the Act, and they accordingly gave judgment for the appellant. Bailhache J. was of opinion that the case was covered by the authority of *Glossop* v. *Ashley* (1), but said that if it had not been for that decision he would have held the other way.

The defendants appealed.

Maurice Healy for the appellants. The Act was not intended only for the protection of the occupying tenant. In *Collis* v. *Flower* (2) an executor of a deceased tenant was held entitled to the protection of the Act although he was not in actual occupation of the house. And the same was held of an administrator in *Mellows* v. *Low.* (3) The Court below acted on the authority of *Glossop* v. *Ashley.* (1) But there the question before the Court was different—namely, what was the standard rent, and not, as here, whether the premises were within the Act. But even if the protection of the statute was intended to be limited to the occupying tenant, Mrs. Hunter in one sense filled that character, for she occupied the house by her furniture. In any case she had as much occupation as the defendant in *Flint* v. *Ead* (4), where the manager of a public-house in London used a house in the country occasionally as a holiday resort only. In such a case as this if an order is made for possession what

(1) [1922] 1 K. B. 1.
(2) [1921] 1 K. B. 409.
(3) [1923] 1 K. B. 522.
(4) (1921) 37 Times L. R. 708.

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will the landlord recover? Clearly not a furnished flat, for the furniture never was the landlord's, and he cannot get an order for possession of something which does not belong to him. But if he gets an order for possession of an unfurnished flat he will get possession of premises to which the Act applies, which is just the very thing that the statute was intended to prevent. Therefore he cannot get an order for possession at all. The words of the proviso "let at a rent which includes payments in respect of . . . . use of furniture" mean "let (at such a rent) by the party applying for possession." Here the party applying for possession did not let it at such a rent. Where a house is let to a tenant unfurnished the fact that he sublets it furnished will not prevent the Act from applying to it as between the tenant and his lessor, though it will do so as between the tenant and his sub-tenant. For the purpose of determining in any particular case whether the Act applies one must, in order to give it any intelligible meaning, look at the relation of the parties before the Court. Sect. 12, sub-s. 6, is an answer to the landlord's claim for possession, for the Act became applicable to the flat upon its being let unfurnished to Mrs. Hunter, and the sub-section expressly says that in such a case the Act "shall continue to apply thereto," that is as between the landlord and Mrs. Hunter, even though by reason of the flat being subsequently let furnished the Act ceases to apply as between the parties to the sub-letting.

Archibald Safford for the respondent. The Act was designed to protect the tenant in two ways, (1.) against a raising of the rent above the pre-war standard, and (2.) against eviction so long as he performs the covenants of the tenancy. The proviso to sub-s. 2 of s. 12, which excludes the application of the Act to houses let furnished, does so subject to an exception—"save as otherwise expressly provided." There is an express provision otherwise, in ss. 9 and 10, so far as protection against the increase of rent is concerned. But there is no such provision with respect to protection against eviction. The result is that though the Act applies

to a furnished house for the former purpose, it does not for the latter, and notwithstanding that the rent is within the statutory limit the tenant may be evicted where the rent at which it was so let included payment for the use of furniture. But if the house, having been let unfurnished, so as to come within the Act, is afterwards sublet furnished, to which letting is attention to be directed for the purpose of the proviso? The answer is, to the letting to the tenant who is in actual occupation at the time of the application for possession, for it is the occupying tenant that it was the object of the Act to protect. In *Glossop* v. *Ashley* (1) where a house, which had been let at a rent outside the Act, was sublet before August 4, 1914, at a rent within the Act, which latter rent continued thenceforward to be paid, it was held that the latter rent was the standard rent, being the rent payable by the occupying tenant. If the occupying tenant is the one to be regarded for the purpose of determining the standard rent, he must equally be so for the purpose of determining whether the house is one to which the Act applies. *Collis* v. *Flower* (2) is no authority for the proposition that a person who has never been in actual occupation of the house can apply to the Court for the protection of the statute. Although there the executor, who was the tenant of the house deriving title from the deceased tenant, was not in physical occupation, there was no other tenant, and the residuary legatee was, as Rowlatt J. pointed out, "in occupation as representing" him. His Lordship expressly said that he doubted whether the Act could be "invoked to protect the financial position of a mesne lessor" such as that of Mrs. Hunter in the present case. Sect. 12, sub-s. 6, creates no objection to the landlord's claim, and for two reasons: In the first place it says that where the Act has become applicable to any dwelling-house it shall continue to apply "thereto," that is to the dwelling-house to which once so applied, and in *Phillips* v. *Barnett* (3) it was held that if the house is so altered that it ceases to be the identical dwelling-house, there is

(1) [1922] 1 K. B. 1. (2) [1921] 1 K. B. 409.
(3) [1922] 1 K. B. 222.

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nothing on which the sub-section can operate. Here upon the unfurnished flat being let furnished it became something different in kind for the purposes of the sub-section, and lost its identity, within the principle of that decision. Secondly, the terms of the sub-section are quite consistent with the proviso to sub-s. 2, for that proviso does not exclude the application of the Act, on the contrary it expressly preserves it for the purposes of ss. 9 and 10, it only takes away the tenant's protection from eviction. Therefore notwithstanding sub-s. 6, upon the flat being let furnished, the tenant became liable to be evicted.

Maurice Healy was heard in reply.

BANKES L.J. This is an appeal from the Divisional Court which raises a short point under the Increase of Rent, etc., Act, 1920, but a point which involves the same difficulty that we usually experience in construing the provisions of that statute. The facts of the case are these: The landlord let a flat, being a dwelling-house to which the Act applied, unfurnished to a tenant, Mrs. Hunter. The tenant, without going into occupation of it herself, furnished the flat and sublet it at a rent which included payment for the use of the furniture. The landlord, having given the tenant notice to quit, contends that inasmuch as the flat was, at the time when he gave the notice to quit and at the time when that notice expired, let as a furnished flat, the Act did not apply, and that he is therefore entitled to recover possession on the expiry of the notice. The tenant, on the other hand, contends that a house which is once within the Act is always within the Act, and that as it applied at the time of the letting to her it has not ceased to apply, and the landlord is consequently not entitled to possession. If that contention of the tenant is to prevail it would result in this extraordinary consequence, that if the landlord let a dwelling-house to which the Act applied to a tenant, and, upon that tenancy being duly determined by notice, furnished the house and then re-let it to another tenant, it would be open to that new tenant to contend that the Act still applied to the premises. If

that is the necessary result of the statute it would seem to amount to an absurdity, and I should certainly endeavour to put a different construction upon it; but Mr. Safford has convinced me that it is not only possible but that it is obviously the correct construction of the statute to read it as not applying where the house is let as a furnished house at the time when the landlord seeks to obtain possession.

During the course of the argument it was pointed out that there is a difficulty in reconciling the provisions of ss. 9 and 10 of the Act of 1920 with the proviso to s. 12, sub-s. 2, but I think Mr. Safford has supplied the construction which gets over that difficulty. The proviso is in these terms: "Provided that this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payment in respect of board, attendance, or use of furniture," and he points out that the statute operates to protect the tenant in two ways, first in connection with the rent which he may be compelled to pay, and secondly in connection with the landlord's right to eject him. He then points out that the words "otherwise expressly provided" refer to ss. 9 and 10. But those sections deal only with the question of rent. When you are dealing with the question not of rent but ejectment there is no provision in the statute excepting the house from the application of the proviso. In this way he gets over the difficulty of reconciling ss. 9 and 10 with the proviso. He then says that the dwelling-houses to which the Act applies are to be ascertained partly by reference to the rent which is paid for them and partly by reference to the use to which they are put. There is no question here with reference to the rent paid for the flat, for the standard rent is clearly within the Act, the only question is with respect to the use to which it is put. It is argued that in s. 12, sub-s. 2, the statute is dealing with the status of the house rather than with the rights of the particular party to the litigation. The Act is not to apply to a dwelling-house which is let furnished. But at what time is its status of a furnished house to be considered? It would seem that

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the material time is when the landlord seeks to obtain possession. If at that time the status of the house is that of a house let as a furnished house it is immaterial that at some earlier date its status was that of an unfurnished house. In my opinion that is the true construction to put upon this difficult statute for the purpose of determining this particular question. I think the decision of the Divisional Court was right and that the appeal should be dismissed.

SCRUTTON L.J. I agree. During the war, for reasons which it is not necessary to specify, the supply of houses became unequal to the demand, and the ordinary economic consequence followed, that landlords were able to ask, and did ask, a much higher rent for their houses than was possible before the war. Great public feeling was aroused by the exorbitant demands for rent that were made and the ejectments for non-payment of it, with the result that Parliament passed the Rent Restriction Acts with the two-fold object, (1.) of preventing the rent from being raised above the pre-war standard, and (2.) of preventing tenants from being turned out of their houses even if the term for which they had originally taken them had expired. That legislation was in terms limited to dwelling-houses, that is houses or parts of houses let as separate dwellings, and for some reason, which we need not inquire into, Parliament thought it right to say that the provisions of the Act should not apply, "save as otherwise expressly provided," to dwelling-houses let at a rent which included payment in respect of board, attendance, or use of furniture, that is to say they shut furnished houses and furnished apartments out of the benefits that they were conferring on the tenants of unfurnished dwelling-houses or apartments. The words "save as otherwise expressly provided" appear to refer to ss. 9 and 10, which gave the tenant of a furnished house a protection as to the rent charged by reference to the normal profit before the war, but there was no provision in the Act giving the tenants of furnished houses the benefit of protection from ejectment upon the determination of their tenancies.

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That being so this state of facts arises in this case: A landlord lets to a tenant an unfurnished flat; the tenant sub-lets it furnished; and the question arises whether that flat is within the protection of the Act at all. The landlord says that as the flat is let at a rent which includes payment for the use of furniture the Act does not apply to it. The tenant says that as the landlord let it to her unfurnished it is within the Act as between him and her, though as between herself and her sub-tenant it is not. The matter is complicated by s. 12, sub-s. 6, which provides that: "Where this Act has become applicable to any dwelling-house . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies." What Parliament exactly meant by those latter words is far from clear. We had that section before us in a case where three dwelling-houses were structurally altered and converted into a factory: *Phillips* v. *Barnett* (1); and counsel for the appellant there went so far as to argue that if a building once came within the Act, whatever happened to it, even if it were pulled down and another building erected in its place, the Act continued to apply to the substituted building. We declined to accede to that argument, and said that where the dwelling-house to which the Act originally applied was no longer existing but had been altered into something substantially different, the tenant could not claim the protection of s. 12, sub-s. 6, and the premises were outside the Act. I think we should have come to the same conclusion if the facts had been that what had been a dwelling-house was, without structural alteration, let entirely as business premises, and the reason would have been the same, that the dwelling-house to which the Act originally applied had ceased to exist, by reason of its being altered into something wholly different —namely, business premises. And I think that, following that reasoning, we should also say in the present case there is no longer a dwelling-house within the Act, but a furnished house to which the Act has expressly said the provisions as to ejectment shall not apply. Notwithstanding that the

(1) [1922] 1 K. B. 222.

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house may at one time have been let unfurnished, and notwithstanding the provisions of s. 12, sub-s. 6, if at the time the landlord seeks to obtain possession it is furnished the Act affords no protection. This view, I think, follows the lines upon which this Court decided *Glossop* v. *Ashley*. (1) There on an application by a landlord for possession of a house it appeared that before August 3, 1914, it had been let to a tenant at 130*l*. a year who had sublet it at a rent of 24*l*., and the question was, Which of those two rents was the standard rent? I certainly took the view, and I do not think that my brothers dissented, that you must look at the occupying tenant and at the rent which he is paying, rather than to the rent which is received by the landlord. So in this case also I think you must look at the occupying tenant and at the nature of his occupation, and as it appears that the house was let to him furnished, the premises are outside the protection of the Act. For these reasons I have come to the same conclusion as the Divisional Court, and the only point on which I differ from them is that Bailhache J. at any rate would have decided otherwise but for *Glossop* v. *Ashley*. (1) I should have decided the same way if *Glossop* v. *Ashley* (1) had not been in existence, and I think that that decision was right.

SARGANT J. I am of the same opinion. It is to be observed that, in the words of Sankey J. in *King* v. *York* (2), which I do not think have been dissented from, "the Act applies to things not to persons, it operates in rem not in personam," and it would be a mistake when considering the operation of the Act to attach too much importance to the actual terms of the tenancy between the two persons between whom the litigation arises. The Act applies only to houses under a certain rent, and only to dwelling-houses, and that term "dwelling-houses" must be understood as limited to unfurnished dwelling-houses. For the purpose of determining the status of a particular house and ascertaining whether it is within the Act or not, it is necessary, where there are

(1) [1922] 1 K. B. 1. (2) (1919) 88 L. J. (K. B.) 839.

several tenancies and sub-tenancies affecting it, to consider which of those tenancies is the material one for the purpose. In *Glossop* v. *Ashley* (1) it was held that, for the purpose at any rate of determining the standard rent of the house, the material bargain is that which has been made with the occupying tenant, and upon the ground, as Scrutton L.J. insisted, and I desire to concur with him—that the object of the Act was prima facie to protect the occupying tenant. If the status of the house as regards the standard rent is to be ascertained by looking at the position of the occupying tenant, there is as much or more reason for regarding the position of the occupying tenant for the purpose of determining whether the landlord can obtain an order for possession. In this case the occupying tenant is a person to whom the house was let furnished, and the person who comes here and asks to be protected under the Act never was an occupying tenant, but took the flat for the express purpose of subletting it furnished at a profit. The flat must, in my judgment, be considered with reference to its actual occupation as being a dwelling-house let furnished and therefore as being outside the protection of the Act.

Appeal dismissed.

Solicitors for the appellants: *H. I. Sydney & Co.*
Solicitors for the respondent: *Dallimore, Pilbrow & Co.*

(1) [1922] 1 K. B. 1.

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[IN THE COURT OF APPEAL.]

SUTCLIFFE *v.* CLIENTS INVESTMENT COMPANY, LIMITED.

[1923. S. 2445.]

Negligence—Invitor and Invitee—Licensee with an Interest—Workman executing Repairs—Defective Balcony—Liability of Landlord.

The owners of a flat let it on a lease to a tenant and agreed to contribute to the cost of decorating and repairing it at the commencement of the term. The tenant employed a firm of builders to do the work. The firm's advertisement board was fixed to a balcony with a balustrade projecting from the front wall of the flat. The judge at the trial found that the balcony was not parcel of the demised premises but was part of the exterior of the premises which the lessors were bound to repair. The jury found that the balcony was dangerous and that the lessors knew or ought to have known this. When the work was finished the firm's foreman went on the balcony to remove the advertisement board. The balustrade gave way and the man fell into the street below and was killed.

In an action by his widow under the Fatal Accidents Act, 1846, against the lessors of the flat:—

Held, that the plaintiff was entitled to recover, for that the deceased man was more than a bare licensee of the defendants and was at least a licensee with an interest, with the same rights as an invitee, and that there was evidence to support the finding of the jury that the defendants ought to have known the balcony was dangerous.

Indermaur v. *Dames* (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311 and *Gautret* v. *Egerton* (1867) L. R. 2 C. P. 371 followed.

Fairman v. *Perpetual Investment Building Society* [1923] A. C. 74 discussed.

Appeal from the judgment of Avory J. in an action tried before the learned judge and a common jury.

The defendants were the assignees of a lease for ninety years from December 25, 1887, of a piece of land and buildings thereon, including a block of flats numbered 10 Hanover Square, by which lease the lessees covenanted that they would during the continuance of the demise duly keep the said buildings and all party and other walls in good tenantable repair and would once in every four years paint with two coats of good oil colour the external wood cement and iron work and once in every seven years in like manner paint

the internal wood iron and other work and would whitewash and cleanse the buildings outbuildings areas passages and drains when and where necessary.

By a lease dated March 21, 1923, the defendants let to one Stanley Sherwin All that suite of rooms numbered 1 on the first floor of 10 Hanover Square for a term of fourteen years from March 25, 1923. The said lessee covenanted to keep the interior of the said premises and the painting papering and decoration thereof and the fixtures and fittings and interior appointments belonging thereto in good and tenantable repair and condition; not to make any alteration whatever in the construction or arrangement of the said premises nor fix any placards notices paintings or writings on the exterior walls or elsewhere on the exterior of the said building; to keep the windows properly cleaned and all sinks and waste pipes clean and open and to make good without delay all damage occasioned by the stopping up of such waste pipes or the bursting of the interior waste pipes; not to use the said premises for any other purpose than as a bachelor's private residence; to allow the defendants and all persons authorized by them at all reasonable times to enter the said premises for the purpose of inspecting the same and of fixing examining and repairing any gas water drain or other pipes or any electrical wires or cables or for the purpose of painting cleansing or repairing the exterior of the said premises or doing any repairs from time to time required to any other portions of the building.

The defendants covenanted to keep the entrance hall staircase and landings in good order and condition and sufficiently lighted and after any injury by fire to rebuild and reinstate the premises.

The flat had a bay window opening outwards and a balcony with a coping supported by columns and small bathstone pillars. The balcony was from 12 to 18 inches in depth. There was evidence that the coping and pillars had suffered from exposure to the weather, that one of the pillars had been repaired with a spigot, and that three others were cracked and that the cracks were discoloured with age. There was

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also evidence that the defendants employed builders once a month to clean out gutters on the balconies and had given them instructions to inspect the building and report any want of repair.

The plaintiff was the widow of one Joseph Sutcliffe. She brought the action under the Fatal Accidents Act, 1846, for the benefit of herself and her child. Joseph Sutcliffe was a foreman painter in the employment of Hickman & Co., Ld., builders and decorators. This firm was employed by Stanley Sherwin, the lessee of the flat, to do certain decorative work. The work was being done with the knowledge of the defendants, who were contributing towards the expense of the decorations. The firm commenced work on March 27, 1923. A man named Clarke, who was then in charge of the work, fixed the firm's advertisement board, which weighed about 30 lbs., in front of the balcony by means of a cord round the column above one of the pillars, so that the board rested on a ledge outside and in front of the pillars. Clarke did not notice any defect in the balcony. The work was finished on May 8. On that day Joseph Sutcliffe went on the balcony, undid the cord and lifted the board off the ledge. Then the whole of the coping between the columns, and two or three of the pillars, gave way together and Sutcliffe fell some 18 feet into the street below and was killed.

The questions left by the learned judge to the jury and their answers thereto were as follows :—

1. Was the balustrade at the time of the accident dangerous for persons using the balcony ? Yes.

2. Was the danger apparent to any one using the balcony ? No.

3. Did the defendants know or ought they to have known the condition of the balustrade ? Yes.

4. Did the balcony at the time of the accident constitute a trap to the deceased ? That is, was it a concealed danger ? Yes.

5. Was the deceased guilty of any want of care in using the balcony as he did ? No.

6. Is it the usual custom of builders and decorators to exhibit a signboard? Yes.

7. Did the defendants' servants know that a signboard was being exhibited? Yes.

8. Did the balcony give way in consequence only of the deceased leaning against it as he lowered the board? (1) Yes.

9. Damages? 1250*l.*; 750*l.* to the plaintiff, 500*l.* to the child.

The learned judge in the course of his judgment said: "It was argued for the defendants that the balcony was demised to the tenant as part of the premises under the lease. I cannot assent to that view. The use of the balcony by the tenant was, I think, an appurtenance which the defendants were bound to keep in repair as a portion of the exterior of the premises. . . . . In the circumstances I think the deceased man was, quoad the defendants, a licensee, and that the answers of the jury establish the liability of the defendants on the ground that the condition of the balcony constituted a trap. I was asked to say that there was no evidence to justify the answer to the third question. It is not for me to say in what way I should have answered that question. There was undoubtedly evidence given on behalf of the defendants which would have warranted the jury in answering, No; especially when they answered no to the second question. But on the other hand there was evidence given for the plaintiff from which the jury may have thought that a proper supervision by the defendants would have made the defects in this balcony or balustrade apparent. In these circumstances I cannot say there was no evidence on which the jury might answer the third question as they did." After referring to *Latham* v. *Johnson* (2); *Cavalier* v. *Pope* (3); and *Fairman* v. *Perpetual Investment Building Society* (4), the learned judge said that the case which most nearly resembled the present in its facts was *Ivay* v. *Hedges* (5),

(1) This question was put by the learned judge because of a suggestion that the coping might have been damaged by the builders' workmen.

(2) [1913] 1 K. B. 398.

(3) [1905] 2 K. B. 757; [1906] A. C. 428.

(4) [1923] A. C. 74.

(5) (1882) 9 Q. B. D. 80.

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but that it was distinguishable, because there the landlord had not undertaken to repair the rail and the question whether he had set a trap for the licensee was not raised.

He therefore entered judgment for the plaintiff according to the findings of the jury.

The defendants appealed.

Colam K.C. and *Bartley* for the appellants. The appellants are entitled to judgment; for

First, they owed no duty to the deceased man to keep the balustrade in repair. The learned judge was wrong in holding that the balcony was not part of the demised premises. It passed under the demise, although not specially named. The only access to it was from the window, through which the appellants had no right to go after the lease. They cannot have intended to retain in their occupation something which they could not use, and which their tenant could. But if the appellants were not in occupation of the balcony they could not license the deceased man to use it. The licensor was the tenant, who was the occupier of the flat and the balcony. He employed the builders for his own purposes and not for those of the appellants.

Secondly, if the balcony was not part of the demised premises, the deceased man was no more than a bare licensee of the appellants, and the case falls within *Ivay* v. *Hedges*. (1) The learned judge has distinguished that case on the ground that there the landlord had not undertaken to repair the rail, while in the present case the appellants had undertaken to keep the building in good tenantable repair. But their undertaking was to their superior landlord, and not to the deceased man; and no one can insist on a contractual obligation who is not a party to the contract: *Cavalier* v. *Pope* (2); *Malone* v. *Laskey*. (3) Therefore the appellants, if liable at all, are only liable as licensors. That being so, the learned judge has measured their liability by the wrong standard. He has asked the jury whether the appellants

(1) (1882) 9 Q. B. D. 80. (2) [1906] A. C. 428.
(3) [1907] 2 K. B. 141.

knew or ought to have known the condition of the balustrade. In other words, he has applied to licensors the measure of liability properly applicable to invitors. The position of a bare licensee was defined by Willes J. in *Gautret* v. *Egerton*. (1) The licensor is not liable unless he knew of the dangerous character of the premises and omitted to caution the licensee. There must be something like fraud on the part of the licensor before he can be made answerable. "To create a cause of action, something like fraud must be shown." If a licensee has been allowed to use a private road, the licensor must not place a dangerous obstacle in his way without giving him notice: *Corby* v. *Hill* (2), where Willes J. first used the expression "set a trap for the plaintiff." If a licensee has been allowed to cross a field, the licensor must not introduce a savage horse without warning: *Lowery* v. *Walker*. (3) And if he knows that his premises present an appearance of safety cloaking a real danger he should warn the licensee when giving the licence. But his actual knowledge of danger is a necessary condition of his liability. To say that he had the means of knowledge, or that he ought to have known, is beside the mark; because something like fraud must be shown, and negligence and fraud bear no resemblance to each other. Before he can be made liable he must either create a danger, or omit to disclose a danger of which he knows. That is what Willes J. meant by "setting a trap." Its use in other senses has led to confusion.

The duty towards an invitee is quite different. It was defined by Willes J. in *Indermaur* v. *Dames*. (4) The invitor must "use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Therefore the liability of a licensor depends on his actual knowledge, or what he does know; that of an invitor upon his means of knowledge, or what he ought to have known. There was no evidence whatever that the appellants knew the balustrade was dangerous, and, as they were at the most licensors, it is

(1) L. R. 2 C. P. 371, 375.
(2) (1858) 4 C. B. (N. S.) 556.
(3) [1911] A. C. 10.
(4) L. R. 1 C. P. 274; affirmed L. R. 2 C. P. 311.

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irrelevant whether they ought to have known or not. Consequently the third question ought not to have been put to the jury.

It was contended that the legal position of licensors, which had been accepted by the profession for over half a century, has been altered by *Fairman* v. *Perpetual Investment Building Society*. (1) In that case, although all the learned Lords agreed that licensees and invitees were distinct classes of persons to whom different degrees of duty were owed, Lord Atkinson (2) stated the rule to be that the licensor is responsible for exposing the licensee " without warning to a hidden peril, of the existence of which he knew, or ought to have known " ; and Lord Wrenbury (3) stated the rule in similar terms. But, it is submitted that the words " or ought to have known " were introduced per incuriam. Their Lordships can hardly have intended to overrule a long-established principle of law without saying that it was to be overruled and giving reasons why it should be. Moreover both those learned Lords had in recent times stated the rule of law in conformity with the generally accepted opinion. In *Norman* v. *Great Western Ry. Co.* (4) Buckley L.J., as he then was, after dealing with the case of a trespasser, said : " The next is the case of a licensee. He is allowed to come on the premises and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises he must warn the licensee ; he owes a duty to the licensee not to lay a trap for him." And in *Cooke* v. *Midland Great Western Ry. of Ireland* (5) Lord Atkinson stated the principle to be " that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew." Moreover in *Fairman's Case* (1), after stating the rights of a licensee as above (2), Lord Atkinson went on to say that if the plaintiff had been an invitee " her

(1) [1923] A. C. 74.
(2) [1923] A. C. 86.
(3) [1923] A. C. 96.
(4) [1915] 1 K. B. 584, 591.
(5) [1909] A. C. 229, 238.

rights and duties in that character would be those described and measured by the well-known passage from Willes J.'s judgment in *Indermaur* v. *Dames* (1) "—namely, to be protected from damage "from unusual danger, which he" —the occupier—"knows or ought to know," which are to all intents and purposes the words in which the learned Lord had just stated the right of a licensee. And later in his judgment (2) he seems to repeat this description of the invitor's position. But in any view these dicta of Lord Atkinson and Lord Wrenbury were obiter and not binding on the Court of Appeal, for the decision of the House of Lords proceeded upon the ground that the danger was apparent, and therefore the occupier's liability for a concealed danger did not come in question. It may be added that in *Latham* v. *Johnson* (3) Farwell L.J. cited with approval the passage above referred to from the judgment of Willes J. in *Gautret* v. *Egerton*. (4)

Harold Morris K.C. and *Tristram Beresford* for the respondent were stopped by the Court.

Colam K.C. in reply.

BANKES L.J. By the judgment under appeal the plaintiff recovered a substantial sum as damages for the death of her husband resulting from a fall from a balcony on the first floor of a building in Hanover Square. The action was brought against the defendants, who may be regarded as the owners of the building. The balcony was in front of a flat or suite of rooms on the first floor which had been let to a tenant by a lease in March, 1923. The lease is silent as regards the balcony, so it does not appear whether it was parcel of the demise or not. It provided that the lessee should repair the inside of the flat. For that purpose he employed some contractors to put the inside into repair before he went into occupation, and the defendants were contributing to the expense of this work. The contractors had hung over the balcony an advertisement board with

(1) L. R. 1 C. P. 274, 288.
(2) [1923] A. C. 89.
(3) [1913] 1 K. B. 398, 405.
(4) L. R. 2 C. P. 371, 375.

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their name and address. When the work was finished the deceased man went to remove the board. While he was doing this the whole front of the balcony fell into the street; he fell with it and was killed.

Several questions arise before the responsibility of the defendants can be established. The first is whether the balcony was part of the demise. In this case that is a question of fact. The learned judge arrived at the conclusion that it was an appurtenance which the landlords were bound to repair. A detailed investigation of all the circumstances would be necessary to satisfy this Court that the decision below was wrong; but the only argument before us was founded on such facts as we have and the form of the lease. I decline to disturb the finding of the Court below on such materials as these. If parties are content to take the view of the judge upon such a question and upon such evidence, they must stand or fall by it. There is therefore no evidence on which we can disturb the finding that this balcony was not part or parcel of the demised premises. So far therefore the defendants may be responsible.

Then in what circumstances and in what character was the deceased man on the balcony? It was argued that he was there as a bare licensee. Now it is established beyond question that the responsibility of the occupier of premises towards a bare licensee is merely not to set a trap for him; apart from dangers of which the occupier knows and the licensee does not know, the licensee must take the premises as he finds them. Both in the Court below and in this Court attention was called to passages in the report of *Fairman* v. *Perpetual Investment Building Society* (1), where two of the learned Lords seem to express the view that at the suit of a bare licensee the occupier may be responsible not only for dangers of which he does know, but for dangers of which he ought to know, and one ground on which the judgment in the present case is based is that *Fairman's Case* (1) has established that degree of liability towards a bare licensee. I speak with respect of the opinions of the learned Lords in *Fairman's*

(1) [1923] A. C. 74.

Case (1), but it was not necessary in that case to extend or enlarge the liability of an occupier towards a bare licensee, and it does not appear anywhere that any of their Lordships intended to make any alteration in the law. No alteration was in fact made if the plaintiff in that case was a licensee with an interest, because there is no material difference between a licensee with an interest and a person who is described as an "invitee," that is to say a person in the position of the plaintiff in *Indermaur* v. *Dames* (2), and the position of both is better than that of a bare licensee. In my view this Court ought not to take those expressions as effecting an alteration in the law; but it is not necessary to pronounce any decided opinion upon the intention of the House of Lords regarding bare licensees, because the deceased man in this case was more than a bare licensee; he was upon the demised premises doing repairs in which both the tenant and the landlords were interested, for though the tenant was the one to give the order the landlords were responsible to him for part of the cost. A workman who comes upon premises to do repairs in these circumstances is more than a bare licensee of the landlords; he is at the least a licensee with an interest, whose rights are the same as those of an invitee within *Indermaur* v. *Dames*. (2) Therefore the second point must be decided in favour of the plaintiff.

Then ought the landlords to have known of the dangerous condition of the balcony? The jury found that they ought, and so the question is whether there was evidence on which they could so find. The learned judge held that there was, and I agree. It is not necessary to go through the evidence; it is enough to say that the balcony was made of bathstone and there was evidence of cracks in the trellis work which showed that it was giving way. That being so, it is impossible to interfere with the finding. In the result the appeal must be dismissed.

SCRUTTON L.J. In this case the plaintiff's husband was working under an immediate employer. He met his death

(1) [1923] A. C. 74. (2) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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because a balustrade fell and he fell with it while engaged in the task of lowering a board which his employer had put up for the purpose of advertising himself. No wonder the landlords are surprised that damages for the man's death should be paid by them; but their liability results from the findings of the jury, which we have no power to reverse if there is any evidence to support them, although we might have come to a different conclusion.

The first question is, Did this balcony and balustrade form part of the premises demised to the tenant? Because if they were included in the demise, I do not think, as at present advised, that any action would lie against the landlords. It would be a strange conclusion if wé had to decide this question of parcels without hearing the views of the tenant of this flat and the various other tenants. The learned judge has decided the question as a matter of law, and in the circumstances I do not feel able to interfere with his decision, and so we must proceed on the assumption that not being included in the demise they remained in the possession and control of the landlords.

This leads to an examination of the authorities in order to ascertain in what capacity the deceased workman came upon the premises, whether as a trespasser, or as a bare licensee, or as a licensee with an interest whose rights are the same as those of an invitee; or was he invited in such circumstances that there was an actual warranty by the invitors that the premises should be as safe as reasonable care and skill could make them? In *Hayward* v. *Drury Lane Theatre* (1) I attempted to state the various degrees of liability towards these persons resorting to the premises of others. I think my statement is with one exception substantially the same as that of Hamilton L.J. in *Latham* v. *Johnson*. (2) I said: "A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid

(1) [1917] 2 K. B. 899, 913. (2) [1913] 1 K. B. 398.

by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them: see the judgment of Willes J. in *Gautret* v. *Egerton*. (1)

"A licensee who is on premises on the business of the owners, or with a common interest with them, is not a bare or mere licensee, but a licensee with an interest, and has the same rights as an invitee: see *Holmes* v. *North Eastern Ry. Co.* (2); *Wright* v. *London and North Western Ry. Co.* (3)"

Those were both decisions of the Exchequer Chamber and were the first to recognize the status of a licensee with an interest. The judgment proceeds: "In stating the rights of an invitee one must separate those cases where the person using the premises does so for payment. The owners in such a case are bound to see that the premises are reasonably safe, and if they are not safe, and the owners could know of the dangerous condition and negligently did not know of it, they are liable for damages caused: *Mersey Docks Board* v. *Gibbs* (4); *Parnaby* v. *Lancaster Canal Co.* (5) This latter case is treated by Hamilton L.J. in his very instructive judgment in *Latham* v. *Johnson* (6) as a case applying to invitees generally. It seems to me to be a case of an invitee for payment.

"The rights of an invitee who does not pay for his presence are stated in *Indermaur* v. *Dames* (7), and are that the owner of premises must use reasonable care to protect him either by warning or precaution against traps, whether existing or new, dangers which the licensee, if ignorant of the premises, could not avoid by reasonable care and prudence. Against dangers which are not traps in this sense the owner is under no liability—that is, he does not warrant the premises safe or as safe as reasonable care could make them.

(1) L. R. 2 C. P. 371.
(2) (1869) L. R. 4 Ex. 254; (1871) L. R. 6 Ex. 123.
(3) (1876) 1 Q. B. D. 252.
(4) (1866) L. R. 1 H. L. 93.
(5) (1839) 11 Ad. & E. 223.
(6) [1913] 1 K. B. 398, 412.
(7) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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"The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former."

If that is law, in what class should this workman be placed? He was allowed by the tenant to be upon the premises for the purpose of doing repairs, and so far as access to the balcony was necessary for that purpose he was there with the consent of the landlords. He was a licensee with an interest. Now I will do nothing to interfere with the classical judgment of Willes J. in *Indermaur* v. *Dames*. (1) "With respect to such a visitor at least," said that very learned judge, "we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." The jury have found that the defendants knew or ought to have known the condition of the balustrade. If that means that they ought to have known, was there evidence on which they could so find? If there was it is immaterial whether we think we should have found otherwise. But considering the nature of bathstone and the evidence that cracks had appeared in it, I think there was evidence on which the jury could find that a balcony of the age of this one, composed of the stone of which this one was made, was in a precarious condition and that the defendants ought to have known this. For these reasons I think the defendants are liable and the appeal should be dismissed.

ATKIN L.J. I agree. We ought not to interfere with the decision of the learned judge that the balcony was not demised to the tenant, although the fact might have been differently found on further evidence. Upon the question whether the landlords ought to have known that the balcony was dangerous, there was a great deal of evidence on which the jury could come to the conclusion that they ought to have known it was, and for deciding questions touching the quality of building materials I think a jury is a better tribunal than

(1) L. R. 1 C. P. 274, 288.

a judge. Upon the law I entirely agree with the Lords Justices, and as we cannot interfere with the findings of fact I agree that the appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellants: *Beale & Co.*
Solicitors for respondent: *Barlow, Lyde & Yates.*

W. H. G.

[IN THE COURT OF APPEAL.]

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WATERHOUSE *v.* BARKER.

[1922. W. 2113.]

Practice—Discovery—Bankers' Books—Inspection before Trial—Protection—Tendency to incriminate—Bankers' Books Evidence Act, 1879 (42 *Vict. c.* 11), *s.* 7.

On an application under s. 7 of the Bankers' Books Evidence Act, 1879, for leave to inspect and take copies of entries in a banker's books before the trial of an action, the Court is guided by the general rules regulating the inspection of documents before trial. Therefore if the respondent to the application, being a party to the action, objects in proper form that the entries tend to incriminate him, the Court will not grant the leave applied for:—

So *held* by Bankes and Atkin L.JJ. (Scrutton L.J. dissenting).

Parnell v. *Wood* [1892] P. 137 and *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q. B. 669 followed.

APPEAL from an order of Greer J. in chambers.

The plaintiff as executrix of her deceased husband, Alfred Francis Waterhouse, brought an action against Sir David Wilson Barker and Dame Magdalen Wilson Barker his wife, to recover some 10,000*l.* which the plaintiff alleged had been fraudulently obtained between July, 1913, and December, 1920, from the said A. F. Waterhouse by false representations made by the said Lady Wilson Barker in conspiracy with the third defendant, one R. P. Sheldon, to the effect that a certain solicitor, whose name was not mentioned, had become aware of alleged acts of adultery between A. F. Waterhouse

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and Lady Wilson Barker during the period between 1898 and 1909, and was determined to disclose his information to Sir David Wilson Barker unless large sums of money were paid to Lady Wilson Barker.

The writ was issued on June 13, 1922, and an amended statement of claim was delivered on February 29, 1924.

The defendants denied every allegation in the statement of claim except that the plaintiff was the widow and executrix of A. F. Waterhouse deceased and that Lady Wilson Barker was at all material times the wife of Sir David Wilson Barker.

On January 18, 1924, a summons was taken out by the plaintiff under s. 7 of the Bankers' Books Evidence Act, 1879 (1), that she might be at liberty to inspect and take copies of all entries in the books of the National Provincial and Union Bank of England, Ld., Piccadilly Branch, relating to the account of the defendant Lady Wilson Barker with the said bank from January 1, 1913, up to the date of the summons.

In pursuance of an order for directions dated June 28, 1922, and of a further order of March 3, 1924, the defendant Lady Wilson Barker was on March 11, 1924, required to answer on affidavit stating what documents were or had been in her possession or power relating to the matters in question in the action. In compliance with this order the said defendant on March 20, 1924, made an affidavit stating that she had in her possession the documents set forth in the first, second, and third parts of the first schedule thereto; but that she objected to produce the documents set forth in the second part of the said schedule "on the ground that they may to the best of my knowledge information and belief tend to incriminate me and to subject me to a criminal prosecution."

(1) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 7: "On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

The second part of the first schedule contained "copies of bankers' entries of current and deposit accounts of Lady Wilson Barker with the National Provincial Bank, Ld., December 31, 1912, to February 13, 1922."

The affidavit went on to state that the deponent had had, but had not then, in her possession or power the documents set forth in the second schedule—namely, "Bankers' pass books from December 31, 1912, to the date of the current pass book"; that she could not say when these books were last in her possession or power, for that they had been destroyed or lost.

On May 10, 1924, the Master in chambers made an order upon the summons of January 18, that the plaintiff and her solicitor should be at liberty to inspect and take copies (*a*) of all entries in the books of the bank relating to the account of Lady Wilson Barker with the bank from February 13, 1922, onwards, and (*b*) of all entries, if any, relating to her account other than entries of current and deposit accounts in those books from December 31, 1912, to February 13, 1922.

On appeal Greer J. affirmed the order of the Master.

The plaintiff by leave appealed.

Haydon K.C. and *S. E. Pocock* for the appellant. The Master and the learned judge were wrong in excepting from the order for inspection all entries of current and deposit accounts in the bankers' books from December 31, 1912, to February 13, 1922. The grounds on which these entries have been excepted are that in her affidavit of documents the respondent has sworn that to the best of her knowledge and belief they tend to incriminate her. But it is no reason for refusing to make an order under s. 7 of the Bankers' Books Evidence Act, 1879, that the entries in the books may incriminate a customer. The Act was passed for the benefit of bankers, to avoid constant interruption of and interference with their business, and to prevent the necessity of sending clerks to attend on subpœna with the bank books in which but for the subpœna they would be making entries in the course of their business: see per Lindley L.J., *Parnell* v.

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Wood. (1) A solicitor could not excuse himself from giving evidence on the ground that his answers might incriminate his client: *Parkhurst* v. *Lowten* (2), and still less can a banker claim protection on the ground that entries in his books will incriminate his client. The order for inspection may be obtained ex parte without notice to the party whose account is to be inspected: *Arnott* v. *Hayes.* (3) The cases cited on behalf of the respondent, *Parnell* v. *Wood* (4) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (5), were both decided on the ground that the entries were irrelevant. The objection that the entries in question are so relevant as to be incriminating has never been admitted. In *Perry* v. *Phosphor Bronze Co.* (6) an order for inspection was made, although the respondent to the application had scheduled his banker's pass books to his affidavit of documents.

At the best the objection is merely dilatory. The only effect of its success would be to embarrass the plaintiff by withholding relevant evidence until the trial and probably involving one side or the other in the costs of an adjournment.

Hawke K.C. and *Lord Erleigh* for the respondent. The argument for the appellant would have more force if this were an application made to the judge at the trial. Applications for inspection before trial stand on a different footing. They are governed by the ordinary rules regulating the inspection of documents before trial. One of these rules is that if the respondent to the application pledges his oath that the documents in question are irrelevant, the applicant cannot have inspection of them before trial. Accordingly on an application for inspection of entries in bank books under s. 7 of the Bankers' Books Evidence Act, 1879, if the respondent swears that the entries are irrelevant the applicant cannot have inspection before trial. That is the ratio decidendi of *Parnell* v. *Wood* (4) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (5), both decisions of the Court of Appeal, where

(1) [1892] P. 137, 139.
(2) (1818) 2 Swanst. 194, 211.
(3) (1887) 36 Ch. D. 731.
(4) [1892] P. 137.
(5) [1895] 2 Q. B. 669.
(6) (1894) 71 L. T. 854.

the Court laid down the principle on which it should act in relation to these applications. Another rule regulating inspection of documents is that if the respondent to the application states on oath that the documents tend to incriminate him, the applicant cannot have inspection of them before trial. It follows that the appellant in this case cannot have inspection of the current and deposit accounts between December 31, 1912, and February 13, 1922. The contention that the objection is merely dilatory, and that the inspection will be granted at the trial notwithstanding the respondent's statement that the entries are incriminating, would apply equally where objection was taken on the ground of irrelevance. That contention did not prevail in *Parnell* v. *Wood* (1) or *South Staffordshire Tramways Co.* v. *Ebbsmith* (2), and ought not to prevail in the present case.

Haydon K.C. in reply.

Cur. adv. vult.

June 23. The following written judgments were delivered:—

BANKES L.J. This appeal raises an important point of practice in reference to the right to inspection before trial by a party to a litigation of entries in the books of the banker of another party to the litigation. The power of inspection is given by s. 7 of the Bankers' Books Evidence Act, 1879, which provides that "on the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings." This Act and its predecessor, the Act of 1876, were passed in the interest of bankers in order to prevent interference with their business, and needless expense and trouble, and to facilitate the giving in evidence of relevant material contained in their books. Incidentally also the section, part of which I have quoted, has afforded an opportunity to a litigant of becoming possessed in advance of the trial of what may be very valuable information. *Perry* v. *Phosphor Bronze*

(1) [1892] P. 137. (2) [1895] 2 Q. B. 669.

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Co. (1) is an instance where the Court gave the litigant the opportunity sought for. In that case the plaintiff had disclosed his pass book. The defendants desired to inspect the entries in the bank books on the ground that they would show them more definitely than the pass book could do the nature of the plaintiff's account at his bank. The judge at chambers made the order asked for, and the Court of Appeal affirmed it. It is noticeable, however, that in giving judgment Cotton L.J. says that he considered that a special case must be made out for what he describes as getting behind the pass book, and A. L. Smith L.J. said that to put in force s. 7 of the Bankers' Act was a strong thing to do. It is, I think, common knowledge that the jurisdiction to give inspection of bankers' books under s. 7 of the statute is always exercised with caution, but that orders are constantly made for the inspection not only of the books of the banker of a litigant, but also of the books of bankers of persons who are not parties to the litigation, and that by means of such orders valuable information is rendered available before trial. The question which arises on this appeal only arises when the application is to inspect the books of the banker of a party to the litigation, where that party has in an affidavit of discovery claimed in proper form and on sufficient grounds that the entries sought to be inspected if contained in books or documents in his own possession would be protected from production. On the one hand it is said that the Court of Appeal has laid down the rule that in such a case an order for inspection will not be made. On the other hand it is said that the rule was not laid down in reference to the exceptional case where a litigant claimed protection from inspection on the ground thar it might incriminate him, and that there was no reason why the rule should be applied to that case. To determine this contention it is necessary to look closely into the facts, and the judgments, in the only two material cases : *Parnell* v. *Wood* (2) and *South Staffordshire Tramways Co.* v. *Ebbsmith.* (3) It is quite true that

(1 71 L. T. 854. (2) [1892] P. 137.
(3) [1895] 2 Q. B. 669.

in neither of these cases did the particular point in issue here arise. In both cases an affidavit had been made denying the relevancy of the entries of which inspection was sought. In the one case the party disclosed the pass book, but claimed to seal up parts which were sworn to be irrelevant. In the other case the party obtained copies from his bank of certain entries in the bank books and included them in his affidavit of documents, and then swore that with those exceptions there were no entries in his account of which inspection was sought relating to the matters in question in the action. It is in reference to these facts that the expressions in the judgments must be read, but making full allowance for the difference in the facts of those cases and of the present one, I think that the judgments do lay down a general rule of practice which is just as applicable to the one set of facts as to the other, and which consequently we must follow. Had the question come before the Courts in its present form in the first instance I am not at all sure that the judgments would have been expressed as they are. That however is not a material consideration. We must deal with the judgments as they are, and not as what under other circumstances they might have been. I think that perhaps the strongest passage in support of the view I am expressing is to be found in the judgment of Lindley L.J. in *Parnell* v. *Wood* (1) where he says: "The plaintiff was ordered to make an affidavit as to documents and produce them. She complied. She set out her pass books and produced them, sealing up parts of them which she swore to be irrelevant to the matters in issue. Her opponents, therefore, have got production of the pass books to the extent to which, as between them and her, they are entitled to see them before the trial." And later on in his judgment he says: "The sole object of this application is to get behind the privilege, and such an object is not within the scope of the Act." This was the ground upon which the Lord Justice based his judgment. It is a ground which places discovery of a litigant's bankers' books on the same footing as

(1) [1892] P. 139.

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discovery of documents in the litigant's own possession, and it covers a claim for protection from production on the ground of a tendency to incriminate just as completely as a claim for protection from production on the ground of irrelevancy. In the *South Staffordshire Case* (1) Lord Esher M.R. says in terms that the exercise of the jurisdiction of the Court to make an order under s. 7 of the Bankers' Books Evidence Act ought to be regulated by the general rules laid down by the decision in relation to documents before trial. I do not refer to the other judgments in these two cases, as I find nothing in them indicating that the Lords Justices did not entirely approve of the passages in the judgments which I have quoted. Under these circumstances I think that this appeal fails and must be dismissed with costs in any event. I need hardly add that this decision has no bearing at all upon the admissibility of the evidence at the trial, and any delay or expense which may be incurred owing to the defendant having taken the objection to inspection at this stage can be adequately dealt with by the trial judge.

SCRUTTON L.J. This appeal raises an important question under the Bankers' Books Evidence Act, 1879, under curious circumstances. The plaintiff, the executrix of one Waterhouse, deceased, alleges that the defendant, Lady Wilson Barker, in collusion with a named solicitor, has fraudulently obtained money from the deceased man by untruly representing that the solicitor would disclose to her husband her adultery with the man now dead. The claim gives particulars of some twenty payments between 1913 and 1920 alleged to have been made by the dead man in bank notes in consequence of these fraudulent misrepresentations. The interlocutory proceedings took an unusual course. At first it was contended that the female defendant was unfit to plead, so that no discovery at all could be required from her. On inquiry before a Master the lady was found fit to plead. She then took the bold course of declining to produce sixty-five letters in the handwriting of the dead man, two draft letters in her

(1) [1895] 2 Q. B. 669, 674.

own writing and "copies of bankers' entries of current and deposit accounts of Lady Wilson Barker with National Provincial Bank, Ld., between 1912 and February 13, 1922," the latter being the date of the death of the plaintiff's testator. Her refusal to produce the documents was sworn to be on the ground "that they may to the best of my knowledge information and belief tend to incriminate me and subject me to a criminal prosecution." It can hardly be contended therefore that parts of the documents are not relevant. Before this affidavit had been sworn the plaintiff had taken out a summons under the Bankers' Books Evidence Act for liberty to inspect and take copies of the accounts in question. The Master and judge refused it at the present stage, on the ground, as I gather, that two decisions of the Court of Appeal, *Parnell* v. *Wood* (1) and *South Staffordshire Tramways Co.* v. *Ebbsmith* (2), laid down a general rule that the Act did not extend the limits of discovery so as to do away with a litigant's privilege. It is to be observed that in each of these cases the defendant had sworn that certain entries in accounts in his custody were irrelevant, and the Court was asked to order inspection of entries in the bankers' books which the defendant had sworn were irrelevant. There is no trace in either of the cases of any consideration by the Court of the question of what was to happen with relevant entries in bankers' books, which yet were privileged if in possession of the client, because they might tend to criminate that client. It seems clear, and was indeed admitted by the defendant's counsel, that the banker could not at the trial refuse to give evidence of transactions recorded in his books because they would tend to criminate his customer. This question was discussed by Lord Eldon in *Parkhurst* v. *Lowten* (3), where discovery by interrogatories was being sought to support a claim against a trustee. The trustee and his executor had successfully objected to discovery on the ground that it might tend to show simony (4), but discovery was then sought against

(1) [1892] P. 137.
(2) [1895] 2 Q. B. 669.
(3) 2 Swanst. 194.
(4) See (1816) 1 Mer. 391.

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Lowten's solicitor to ascertain the dates and amounts of certain payments and the facts about a certain deed. Lord Eldon with his usual caution declined to decide any particular question till he saw it and the witness's objection to answer; but he did decide that the general objection that the witness was Lowten's attorney, and that some answers might tend to criminate his client, was a bad one. He said (1) "The Court would oblige the attorney of Lowten to show that Lowten had been engaged in a simoniacal contract, from discovering which Lowten might protect himself. If the interrogatories are such as not to invade the privilege of the client, which is to be attended to by the attorney, though they bring out proof of simony, yet bringing out proof of payment of the money, they must be answered," and again (2): "There is no doubt, that the privilege which protects a man from criminating himself, does not belong to a witness whose disclosures may criminate not himself, but others; if the matter which the witness has to state is relative to the time of payment, he cannot object to make the statement, because it may prove that some other person has been guilty of an offence." If this is so the plea in this case is merely a dilatory plea. You may not look now at a relevant matter but may look at the trial, a course which seems to me merely a piling up of expense. Lindley L.J. indeed says in *Parnell* v. *Wood* (3): "I do not say that the Bankers' Books Evidence Act might not be resorted to before the trial in some cases—as, for instance, if the pass books had been lost." Curiously enough Lord Eldon in *Parkhurst* v. *Lowten* (4) likens the case of refusal to produce on the ground of tendency to criminate to the case of a lost document, suggesting that secondary evidence might be given in either case. Before the Bankers' Books Evidence Act, 1876, if it was desired to prove a banking transaction some one from the bank must be called who conducted the transaction, and it would usually be necessary for him to refresh his memory by producing the original books

(1) 2 Swanst. 211.
(2) 2 Swanst. 215.
(3) [1892] P. 139.
(4) 2 Swanst. 213.

of the bank. It would undoubtedly interfere with banking business to have clerks and original books, both required at the bank for other purposes, required to attend the Law Courts. So in 1876 an Act (1) was passed "to amend the law with reference to bankers' books evidence," reciting that it was expedient to facilitate the proof of the transactions recorded in bankers' ledgers and account books. Sect. 3 made the entries admissible as prima facie evidence of the matters and transactions recorded therein on certain affidavit evidence of source and accuracy being given. But s. 5 provided that the books or copies thereof should not be admissible unless five days' notice, containing a copy of the entries proposed to be adduced, should have been given by the party proposing to give the evidence to the other party. By s. 6 the latter party could on receiving the notice get an order to inspect and take copies of any relevant entry. This Act apparently contemplated that only the customer would wish to prove entries in his own account, and provided that to do so, he must give copies to his opponent, which of course the customer could furnish, and that his opponent should have a right to inspect all relevant entries. But this did not provide at all for the case of the opponent wishing to prove the account of the customer; for the opponent could not serve copies of it, and had no right to get an order for inspection. So the Act of 1876 was repealed by the Act of 1879. The power to inspect was given to any party, and there was no need for him to give notice to the other party unless the judge ordered him to give such notice. It appears to me that the primary object of the Act was to amend the law of evidence as to proof of matters recorded in bankers' books, and incidentally to facilitate proof by giving the person desiring to prove such transactions a right to see the books to extract the requisite evidence. This was the way in which the Court of Appeal used the Act in *Perry* v. *Phosphor Bronze Co.* (2) There the plaintiff had disclosed his pass book, but the defendants wanted to discover and prove matters recorded in the bank books, but not in his pass book. It was argued

(1) 39 & 40 Vict. c. 48. (2) 71 L. T. 854.

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that *Parnell* v. *Wood* (1) prevented this, but both Lindley and A. L. Smith L.JJ. repudiated this, saying the applicant was entitled to get behind the pass books. So also the Court of Appeal in *Arnott* v. *Hayes* (2) pointed out that the Act gave a privilege to a litigant to prove transactions by copy entries, and gave him, that he might know what copies to get, a privilege to look at the books. I cannot think it was intended that the trial must commence before he could inspect and get copies, and that an adjournment must take place to enable him to get his evidence. As Cotton L.J. says in *Arnott* v. *Hayes* (3): "This is not giving the plaintiff discovery from the defendant to assist the plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence." The evidence, if material, is admissible, but the plaintiff cannot tell which entries are material till he inspects. Therefore the Act gives him the power to inspect and take copies. I am bound by *Parnell* v. *Wood* (1) and the *South Staffordshire Case* (4) to hold that where the defendant swears that entries are irrelevant, the plaintiff cannot before the trial get an order to inspect entries prima facie irrelevant. But I cannot see how, when it is admitted that some entries may be relevant, the defendant can prevent the preliminary steps to giving them in evidence by swearing they are so relevant that they may criminate him. He could do so if the documents were in his possession, but they are not, and those in whose possession they are will be bound to give the evidence contained in them. As Atkin L.J. says in *Tournier* v. *National Provincial and Union Bank of England* (5): "It is plain that there is no privilege"—in bankers—"from disclosure enforced in the course of legal proceedings." Here the disclosure seems to me enforced by s. 7 of the Act of 1879, for the purpose of facilitating the giving of relevant matters in evidence at the trial. In the present case the plaintiff

(1) [1892] P. 137.
(2) 36 Ch. D. 731, 738, 739.
(3) 36 Ch. D. 737.
(4) [1895] 2 Q. B. 669.
(5) [1924] 1 K. B. 461, 486.

desires to prove that her testator paid repeatedly to the defendant large sums in bank notes. She relies I suppose on the letters to show why or under what circumstances the sums were paid, and the defendant swears the evidence of payments may tend to criminate her. This seems to me pre-eminently a case where the procedure for facilitating the giving of relevant evidence by banks should apply. In my view, therefore, the appeal should be allowed with costs here and below, and the order asked for made.

ATKIN L.J. In this case the plaintiff appeals from an order of Greer J. affirming an order of Master Simner, refusing to give to the plaintiff an unconditional order for leave to inspect and take copies of the defendant's bank account. The application is made under the Bankers' Books Evidence Act, 1879. The claim in the action is by the plaintiff as executrix of her husband to recover from the two defendants, husband and wife, large sums of money which the female defendant is said to have obtained by fraud from the testator between January, 1913, and February, 1922. The inspection sought is of all entries in the books of the bank in question relating to the account of the female defendant during those dates. The defendant in her affidavit of documents has scheduled her pass books during the period in question, but has sworn that they are lost. She has also scheduled copies of her current and deposit accounts with the bank during that period together with some correspondence with the testator, and has objected to produce those documents, swearing that they may tend to criminate her and subject her to a criminal prosecution. The plaintiff does not seek to contest this objection, but makes the present application, which is to inspect and take copies of the original entries, copies of which in the defendant's possession are admittedly protected from inspection before trial. Such an application appears to me to be in direct conflict with decisions of the Court of Appeal and the practice of the Courts for the last thirty years. The words of the Act give an unlimited power to the Court to order inspection before trial, whether of the

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account of a party or of a third person not a party. But the Court early perceived that to exercise the power without limitation would extend the inquisitorial powers of the Court beyond reason, and that it was necessary to lay down rules for the exercise of their discretion. Rightly or wrongly, as I think rightly, though my opinion is irrelevant, for the decisions bind me, the Court of Appeal has laid down the rule that where the account is the account of a party, the Court is to apply the rules relating to discovery of documents in the possession of the party or his agent; so that if the party might protect the account from inspection before trial, if in his own possession, he shall have equal protection on an application for inspection under the Act. Any other rule would result in an absurdity. A pass book is but a copy of the banker's ledger; and if justice requires that the party should be protected in particular circumstances from disclosing entries in the pass book, it seems preposterous that justice should permit him not to be protected in the same circumstances from an inspection of the original. The two relevant cases are *Parnell* v. *Wood* (1) and *South Staffordshire Tramways Co.* v. *Ebbsmith*. (2) In the former case the plaintiff on discovery had in an affidavit disclosed her pass books, and had sealed up certain portions which were sworn to be irrelevant. The interveners in the suit, a probate suit, took out a summons for leave to inspect and take copies of the bankers' books containing the account. This application was refused by Collins J. in chambers, and by the Court of Appeal. Lindley L.J. said (3): "This application in effect seeks to deprive the plaintiff of the right to seal up until the trial such part of the books as she swears to be irrelevant. I do not say that the Bankers' Books Evidence Act might not be resorted to before the trial in some cases—as, for instance, if the pass books had been lost. But the sole object of this application is to get behind the privilege, and such an object is not within the scope of the Act. The Act was passed mainly for the relief of bankers, to

(1) [1892] P. 137. (2) [1895] 2 Q. B. 669.
(3) [1892] P. 139.

avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business, and by having to send, for the purpose of verifying them, a clerk who would otherwise be employed at the time in making entries in those very books." Lopes L.J. said (1): "The object of this application is to obtain inspection of the parts of the pass books which the plaintiff has sealed up. The Bankers' Books Evidence Act has no relation to this case, which must be decided according to the rules as to discovery. The plaintiff has made an affidavit as to documents in which she has scheduled her pass books, and has produced them, sealing up parts of them, and pledging her oath that the parts sealed up are not relevant to the matters in issue. She is entitled to do so. The appellants seek inspection of the materials from which the pass books are made up, in order in fact to obtain inspection of the parts which are sealed up and sworn to be immaterial. If we granted this application we should destroy all the rules as to privilege." Kay L.J. said (2): "According to the appellants, if a person engaged in litigation has a banking account, his adversary is entitled to inspect that account to see whether he can find anything that will help him. The Bankers' Books Evidence Act has nothing to do with any question of the kind"; and later on he says (2): "I never saw a more extraordinary application than the present. Pass books are produced which are no doubt copied from the bankers' books, but the party producing them seals up parts which she swears not to be relevant. According to the law of discovery, the opposite party has no right to look at the parts so sealed up. The present application is an attempt to get behind the affidavit of the party producing the documents. There is nothing to show that the affidavit is untrue, but the applicants wish to evade it by obtaining inspection of the books from which the pass books were made out."

It was argued before us that this decision is confined to a claim for protection on the ground of irrelevancy. Such a

(1) [1892] P. 140. (2) [1892] P. 141.

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contention appears to ignore the reasoning of the Lords Justices. The principle in terms laid down is that the application must be decided according to the rules of discovery; and that the applicant had no right to get behind the affidavit of documents. It is true that the binding effect of the oath of the party as to relevancy is one of the rules of discovery, and was the particular rule applicable in that case; but the major proposition which is necessary to support the reasoning is that all the rules of discovery relating to protection are applicable; and the major is expressed in terms by both Lopes and Kay L.JJ., and is implicit in the judgment of Lindley L.J. There can be no conceivable ground for importing the rule of discovery as to relevancy which does not import the other rules. For it is to be noted that the case does not turn upon the determination by the Court that the documents sought to be inspected are not shown to be relevant, but upon the acceptance by the Court of the rule of discovery that the litigant's oath on this matter is conclusive. It is also to be noted that the oath was taken not on an affidavit for the purposes of the application, but in the affidavit of documents claiming protection for the pass books. In this respect the facts are precisely those of the present case, for it can hardly be contended that there is any difference between a copy of an account in the banker's ledger in the form of a book, and a copy of the same account in the same ledger in the form of a sheet. This case seems sufficient to decide the present issue, but the matter seems to me to be placed beyond controversy by the decision in *South Staffordshire Tramways Co.* v. *Ebbsmith.* (1) In that case the action was by a limited company against the promoter for an account of secret profits. It does not appear that discovery of documents had been ordered; but the plaintiffs applied for an order under the Act for leave to inspect and take copies of the accounts of the defendant, and of another company not a party to the action. The defendant made an affidavit in which he swore that with the exception of three items, of which he produced duly certified copies, the account contained no relevant

(1) [1895] 2 Q. B. 669.

entries. The Master made the order, which was reversed by Hawkins J. The appeal to the Court of Appeal was dismissed. Lord Esher M.R. said (1): "I have no doubt that the Court has jurisdiction under the section to make the order asked for; but we have to consider and endeavour to lay down the rule of conduct by which the Court ought to be governed in exercising that jurisdiction. This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the Court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the Court granted it subject to this—namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. I think that in exercising its jurisdiction under s. 7 of the Bankers' Books Evidence Act, 1879, the Court ought to be governed by the same rule." If Lord Esher is not saying: All the rules of discovery as to inspection apply; the rule as to relevancy is one of the rules of discovery as to inspection; therefore the rule as to relevancy applies—I am incapable of understanding the reasoning: and if he is, then the major proposition is an essential part of his syllogism, and must be taken by us to be true. Kay L.J. says (2): "The rule as to inspection of documents has always been that it is granted subject to the liberty of the person against whom it is asked for to seal up any part of a document which he swears by affidavit made for the purpose not to be relevant to the issues in the action, and that the other party cannot get behind the statement so made by him upon oath." Then a little lower down on the same page he says: "The question is whether that rule is altered by the Act. It would be very strange if it were. I quite agree with what was said in

(1) [1895] 2 Q. B. 674. (2) [1895] 2 Q. B. 676.

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Parnell v. *Wood* (1) to the effect that it was not intended by the Act to do away with any privilege which a litigant possessed by virtue of which he was entitled to resist or limit the extent of inspection, but only to give inspection subject to such privilege in a certain case where it could not have been given before." When Kay L.J. says "any privilege" I myself have no doubt that he means any privilege, including the present privilege of protection against inspection of documents sworn to tend to criminate, though the particular example in the case cited was protection on the ground of irrelevancy. These being the two leading authorities, the practice of the Courts has followed them ever since they were given. I am confirmed in this, not only by my own experience, such as it is, but by the unrivalled authority in such a matter of the learned editor of the Yearly Practice who, in the notes to Order XXXI., r. 19 (*a*) (2), says: "The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted." Then he proceeds to say: "The main object of this Act is to enable evidence to be procured and given: *Arnott* v. *Hayes* (3); *Emmott* v. *Star Newspaper Co.* (4); *Rex* v. *Bono* (5); and to relieve bankers from the necessity for attending and producing their books: *Parnell* v. *Wood* (1); *Emmott* v. *Star Newspaper Co.* (4); *Pollock* v. *Garle.* (6) It enables a party, who formerly had the right to issue a subpœna duces tecum to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of them: *In re Marshfield.* (7) It does not give any new power of discovery: *Arnott* v. *Hayes* (3), per Cotton L.J.; *Rex* v. *Bono* (5); but consider *Perry* v. *Phosphor Bronze Co.* (8), C. A.; or alter the principles of law or the practice with regard to discovery: *Pollock* v. *Garle* (6), per Lindley M.R.;

(1) [1892] P. 137.
(2) Yearly Practice 1924, p. 458; 1925, p. 470.
(3) 36 Ch. D. 731, 737.
(4) (1892) 62 L. J. (Q. B.) 77.
(5) (1913) 29 Times L. R. 635.
(6) [1898] 1 Ch. 1, 4.
(7) (1886) 32 Ch. D. 499.
(8) 71 L. T. 854.

or take away any previously existing ground of privilege: *South Staffordshire Tramways Co.* v. *Ebbsmith.* (1)" The saving reference to *Perry* v. *Phosphor Bronze Co.* (2) is well founded. The Act thereby gives a right to discovery of documents which could not be in the possession of the party; for it enables the Court where no privilege is claimed to order inspection of entries in bankers' books such as waste books and the like, which would not be found in the pass books, though relating thereto. The case has no relevance to the question of privilege.

It is said by the appellant that it would be wrong to give effect to the defendant's claim for protection, because at the trial the defendant's oath as to the tendency to criminate would not protect the document from production. Nor at the trial would her oath on relevancy, which in view of the above authorities is perhaps a sufficient answer. The rules as to discovery before trial have no reference to protection at the trial. In every case where protection is claimed the claim must be renewed on oath at the trial, unless possibly on the face of the documents a ground for protection is apparent, as in the case of communications with the party's legal adviser. If the protection against disclosure before trial can be obtained for entries in the pass book on such grounds as exclusively disclosing the party's evidence, or of injury to public interests, as it obviously can, I see no reason why similar protection should not be given on the same grounds against disclosure of the original of such entries, the banker's books; and if these grounds of protection exist there can be no possible reason for excluding the ground of tendency to criminate.

If the inspection is at this stage inadmissible it is unnecessary to consider the alleged inconvenience to the plaintiff. I am, however, by no means impressed by it. The documents will apparently be admissible at the trial. The amounts are such that there can be little difficulty in tracing them. I have no doubt that a very short perusal of the document will

(1) [1895] 2 Q. B. 669. (2) 71 L. T. 854.

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put the plaintiff's advisers in full possession of all relevant information. It will not be the only case in which a plaintiff's advisers have obtained inspection of relevant documents for the first time at the trial. The nature of the claim for protection in this case of course throws doubts upon the merits of the defence. I am not prepared however from untested suspicions of the defence to overrule decisions which are both binding on me and are based on principles of which I approve, or to depart from a well established practice based on those decisions. I think therefore that the appeal should be dismissed with defendant's costs in any event. The Master's order is limited. It does not, I think, extend to any entries in waste books, etc., which relate to entries in the current or deposit account; to hold otherwise would be to nullify the privilege. The order so construed is not likely to be of much avail to the plaintiff, but it seems unnecessary to amend it.

Appeal dismissed.

Solicitor for appellant: *L. A. L. North.*
Solicitors for respondent: *Lewis & Yglesias.*

W. H. G.

GORDON *v.* S. GOLDSTEIN.

1924
July 10, 11.

(J. GOLDSTEIN AND ANOTHER, CLAIMANTS.)

Bill of Sale—Grantor—"True owner" of goods—Two Persons signing as Grantor—Goods the Property of One only—Validity of Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.

By a bill of sale a husband and wife who were therein together called "the grantor" purported to assign to the grantee the chattels described in the schedule thereto, which in fact belonged to the wife alone:—

Held, inasmuch as "the grantor" was not the true owner of the chattels at the time when the bill of sale was executed, that, except as against the grantor, the bill of sale was void under the Bills of Sale Act (1878) Amendment Act, 1882, s. 5.

Ex parte Popplewell (1882) 21 Ch. D. 73 and *Brandon Hill, Ld.* v. *Lane and Another* [1915] 1 K. B. 250 distinguished.

Saunders v. *White* [1901] 1 K. B. 70; [1902] 1 K. B. 472, reasoning held applicable.

APPEAL from the order of a Master.

By a document dated October 29, 1923, purporting to be a bill of sale, made between Jane Goldstein, of 155 Green Street, Forest Gate, fishmonger, and her husband, Solomon Goldstein, of the same place, bookmaker and fishmonger's manager (therein together called "the grantor"), of the one part, and Benjamin Cohen (therein called "the grantee"), of the other part, it was provided that in consideration of certain sums making together the sum of 120*l.* paid by the grantee to the grantor the latter assigned to the grantee, his executors, administrators and assigns the chattels and things specifically described in the schedule thereto and being at the said premises by way of security for the payment of the said sum of 120*l.* and interest; and the grantor further agreed to pay to the grantee the principal sum aforesaid with the interest then due by equal monthly instalments of 10*l.* each, the first instalment to become due and payable on November 29, 1923, Provided that if any of the events specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, as causes for which personal chattels assigned under a bill of sale may be lawfully seized or taken possession of should

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happen then the whole of the principal money for the time being secured thereby and remaining unpaid with all interest accrued due thereon should immediately become payable; and the grantor agreed with the grantee that "the grantor, their executors or administrators" would not without consent remove the chattels from the premises, and would not suffer them to be injured or destroyed, and would keep them insured against fire, and would pay all rents, rates and taxes in respect of the premises; and it was further agreed that in any of the events specified in the said section the grantee his executors, administrators or assigns might seize and take possession of the said chattels and might subject to the Act remove and sell them and out of the proceeds of sale retain all the principal moneys owing and unpaid thereunder and interest due and certain costs, and should pay over the residue of the proceeds to the grantor, Provided that the chattels should not be liable to seizure by the grantee his executors, administrators or assigns for any cause not specified in the said section; and the document was signed, sealed and delivered by both the persons therein described as the grantor.

Subsequently S. S. Gordon recovered judgment against S. Goldstein in an action in the High Court for a debt, and the sheriff in levying execution upon the judgment seized certain things on the said premises, including all the goods comprised in the bill of sale. The things seized were claimed by the grantee of the bill of sale and by Mrs. J. Goldstein, whereupon the sheriff took out an interpleader summons calling upon all parties to appear before the Master.

On various dates between March 31 and April 29, 1924, the Master heard the summons, and on the last-mentioned date he gave his decision. Evidence was given by Mrs. J. Goldstein to the effect that the fishmonger's business carried on at the said premises was her business and that her husband merely helped her as manager; that the premises were held under a five years' agreement, which was taken in the name

of her husband, as the landlord would not accept her as tenant; but that she paid the rent; that she received the takings of the business and her husband had no money from it except what she gave him; that all the furniture and other property on the premises had been bought with her money and that it all belonged to her and none of it to her husband; that her husband carried on a separate bookmaking business; and that the debt in respect of which the judgment had been recovered against her husband arose out of his bookmaking business. The Master found that down to the making of the bill of sale all the things seized belonged to Mrs. J. Goldstein, and held that the bill of sale was not bad in law by reason of the joinder of her husband with her as grantor, and made an order that the sheriff should withdraw from possession of the things seized and claimed by the claimants respectively, and that the plaintiff should pay to the sheriff and to the claimants their costs of the interpleader.

The plaintiff gave notice of appeal for an order that the order of the Master should be reversed or varied, and that in lieu thereof judgment might be entered upon each of the issues in the plaintiff's favour or that a new trial might be had, and that it might be ordered (inter alia) that the bill of sale relied upon by the second claimant was null and void as against the plaintiff, and that the sheriff should proceed with and complete the execution by selling the goods the subject matter of the interpleader and such other goods as were upon the premises or in the defendant's reputed ownership; his grounds of appeal being (*a*) as to the first claimant, Mrs. J. Goldstein, that the Master was wrong in admitting her claim on her uncorroborated testimony, that there was no evidence that the business claimed by her was in fact hers, and that even if it was hers she by her representations had estopped herself from claiming it as against the plaintiff, and (*b*) as to the second claimant, B. Cohen, that the Master was wrong in upholding the bill of sale, as there was evidence that it did not state truly the consideration or the real terms of the bargain between

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the parties, and that it was ambiguous, and in form contrary to the provisions of the Bills of Sale Act (1878) Amendment Act, 1882. (1)

Margolis for the plaintiff, appellant. The plaintiff is entitled as against both the claimants to levy execution upon the goods which are the subject matter of the interpleader issue. He is entitled to do so as against the claimant B. Cohen. The bill of sale under which B. Cohen claims the goods is void in respect of the goods described in the schedule as against the plaintiff under the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, inasmuch as the grantor was not the true owner of the goods at the time of the execution of the bill of sale. The "grantor" mentioned in the bill of sale consisted of Mrs. J. Goldstein and S. Goldstein together, but they were not the joint owners of the goods. The master has found that none of the goods belonged to S. Goldstein. In *Saunders* v. *White* (2), where a husband and wife gave a bill of sale as grantors jointly and severally over goods none of which belonged to them jointly, but some to one of them and the rest to the other, it was held (inter alia) that they were not the true owners of the goods. The facts there differed from those here, but the principle applies. In *Brandon Hill, Ld.* v. *Lane* (3), where a husband gave a bill of sale over his sole property as security for money paid in discharge of a liability of the grantor and his wife, it is clearly implied that if the wife had been joined with the husband as grantor the bill of sale would have been void. The case of *Ex parte Popplewell* (4), where it was held that the fact that one of the two grantors of a bill of sale had no interest in the goods did not invalidate the bill of

(1) The Bills of Sale Act (1878) Amendment Act, 1882, provides:—

Sect. 5: "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

(2) [1901] 1 K. B. 70; [1902] 1 K. B. 472.

(3) [1915] 1 K. B. 250.

(4) 21 Ch. D. 73.

sale, was decided before the Act of 1882, when no such provision as s. 5 of that Act was in force, and it has therefore no application here. The intention of the Bills of Sale Acts is that the transaction should be so clearly set forth in the bill of sale that no one consulting the register could fail to understand it. Any one reading this bill of sale would be led erroneously to suppose that the goods were the joint property of both the persons described as the grantor.

[LORD DARLING. The Court will deal with the claim of the claimant, B. Cohen, before proceeding to consider the claim of the claimant, Mrs. J. Goldstein.]

R. J. White for the claimants, respondents. The plaintiff is not entitled to the goods in question as against the claimants. He is not entitled to the goods as against the claimant, B. Cohen. The bill of sale upon which that claimant relies is valid, notwithstanding that the goods comprised in it may have been the separate property of Mrs. Goldstein, and that the persons therein described as "grantor"—namely, Mr. and Mrs. Goldstein together—may not have been the true owner of the goods. This bill of sale does not contravene either the Bills of Sale Act, 1878, or the Bills of Sale Act (1878) Amendment Act, 1882. The object of the earlier Act is no doubt to protect the moneylender against the grantor, but that Act does not contain any provision corresponding to s. 5 (1) of the later Act, that a bill of sale shall be void in respect of goods of which the grantor is not the true owner, and under that earlier Act the inclusion of Mr. Goldstein's name in the description of the grantor is mere surplusage: *Ex parte Popplewell.* (2) The object of the later Act of 1882 is to protect the grantor against the money-lender, and it seems plain that that object is not interfered with by the grantor's intentional misdescription of himself. In *Saunders* v. *White* (3) the grantors assigned the goods not only jointly but jointly and severally, and as the goods as a whole did not belong to either of them either jointly or severally there was in

(1) See note (1) ante, p. 782.
(2) 21 Ch. D. 73.
(3) [1901] 1 K. B. 70; [1902] 1 K. B. 472.

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that case another reason, which does not exist in the present case, for holding the bill of sale invalid.

[SHEARMAN J. In that case the Court held the bill of sale void for both reasons.]

LORD DARLING. In this case Jane Goldstein and her husband Solomon Goldstein purported to give a bill of sale assigning to the grantee certain goods described in the schedule thereto as security for the payment of a sum therein mentioned. In the document the wife and the husband were together described as "the grantor," and they affected to be both the true owners of the goods. Subsequently, the plaintiff recovered judgment against Solomon Goldstein, the husband, and the sheriff in levying execution seized the goods comprised in the bill of sale. The goods were claimed by the grantee of the bill of sale and by Mrs. Goldstein, and thereupon an interpleader issue arose which came before the Master for trial. The Master has found as a fact that at the time when the bill of sale was given the goods belonged to Mrs. Goldstein alone, and that her husband had no interest in them, and that it was not true to say that they were both the owners of the goods. He has thus found that the bill of sale in treating the grantor as the owner of the goods contained an untrue representation. The "grantor" was not the true owner of the goods at the time of the execution of the bill of sale. The instrument therefore does not comply with s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, and is void under that section. We can come to no other conclusion. We cannot treat the bill of sale as valid on the ground that S. Goldstein was joined as a party merely in order to prevent him from afterwards calling the transaction in question. The bill of sale is void, and the grantee is not entitled to the goods in question as against the plaintiff, the judgment creditor.

SHEARMAN J. I am of the same opinion, but I will state shortly the grounds upon which I rely. The claimant Jane Goldstein and her husband Solomon Goldstein joined in

giving the bill of sale in question. In the effective, operative and granting words of the instrument they are both together described as "the grantor." They made the instrument as joint grantors, with the exception of certain covenants which they seem to have entered into jointly and severally. The plaintiff recovered judgment against the husband, and proceeded to levy execution upon the goods comprised in the bill of sale. The goods were claimed by the grantee of the bill of sale. On the trial of an interpleader issue the Master has found that at the time when the bill of sale was made the whole of the goods belonged to the wife alone.

It is said on behalf of the plaintiff that under the Bills of Sale Act (1878) Amendment Act, 1882, s. 5 (1), the bill of sale is void as against him on the ground that the grantor was not the true owner of the goods at the time of the execution of the bill of sale. Several authorities have been cited, but none of them covers this case. In *Ex parte Popplewell* (2), where at the time when a bill of sale was executed one of the two grantors had no interest in the goods assigned, it was no doubt held that the addition of his name was mere surplusage, which did not affect the validity of the instrument. That case, however, was decided at a time when the only Act relating to bills of sale was the Bills of Sale Act, 1878, which gave protection to persons lending money by giving publicity to the transaction of loan, but did not give any special protection to the borrower. The later Act of 1882 with its stringent provisions for the protection of the grantor had not then come into existence. Since the passing of the later Act the case of *Saunders* v. *White* (3) has been decided by the Divisional Court and the Court of Appeal. In that case a husband and wife by a bill of sale jointly and severally assigned certain goods, none of which belonged to them jointly, but some of which belonged to one of them and the rest to the other, and the schedule did not show to which of them the goods respectively

(1) See note (1) ante, p. 782.
(2) 21 Ch. D. 73.
(3) [1901] 1 K. B. 70; [1902] 1 K. B. 472.

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belonged. The Divisional Court held that the bill of sale was void on the grounds that it was not in accordance with the statutory form and that the grantors were not the true owners of the goods. The Court of Appeal were satisfied with the former ground alone, but, though they did not deal with the latter ground, they expressed no disapproval of the decision of the Court below on that ground. In the case of *Brandon Hill, Ld.* v. *Lane* (1) the grantor of a bill of sale thereby assigned chattels which were his sole property as security for money paid on behalf of himself and his wife. His wife was named in the bill of sale both in recitals and as a party and she executed it, but she did not join in the operative assignment or covenants. It was objected that, as she was a party to the bill of sale and did not purport to grant the chattels, the bill of sale was not in accordance with the statutory form. It was held, however, that as the husband who was the owner of the chattels and the actual grantor assigned the chattels, the mere joinder of the wife as a party for a collateral purpose was no infringement of the Act.

The present case differs in its facts from all these previous cases. In this bill of sale two persons are together described as "the grantor" and are both represented as being the true owners of the goods mentioned in the schedule. It appears however that the goods belong to one of them only, and that the representation that they belonged to both of them was untrue. That being so, it appears to me that the bill of sale was not made in accordance with s. 5 of the Act of 1882, and is void under that section. The reasoning of the Court in *Saunders* v. *White* (2) tends to confirm that view. If one other person who was not the true owner of the goods comprised in a bill of sale could be added as a grantor, there would be no limit to the number of persons having no interest in the goods who could be joined as grantors.

For these reasons I think that the claimant, B. Cohen, is not entitled to the goods as against the plaintiff.

(1) [1915] 1 K. B. 250.
(2) [1901] 1 K. B. 70; [1902] 1 K. B. 472.

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[The claim of the claimant B. Cohen having thus been disallowed, the question next arose whether or not the claim of the other claimant, Mrs. J. Goldstein, could be sustained. The Court held that there was evidence to support the Master's finding of fact that at the date of the supposed bill of sale the goods belonged to Mrs. Goldstein and not to her husband; that they still belonged to her, and that she was not estopped from alleging that they did; that her claim to the goods was well founded; and therefore that the plaintiff was not entitled as against her to take them in execution in respect of his judgment against her husband. The Court accordingly dismissed the appeal, but directed that there should be no costs of appeal, and that the matter should be referred to the Master to deal with the costs of the proceedings before him.]

Solicitor for plaintiff: *Samuel Landman.*

Solicitors for claimants: *Bruce Millar & Co.*

J. R.

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